No. 16389

In the United States Court of Appeals for the Ninth Circuit

THE STATE OF NEVADA, EX REL. HUGH A. SHAMBERGER, STATE ENGINEER, APPELLANT

v.

THE UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

BRIEF FOR THE UNITED STATES OF AMERICA, APPELLEE

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OPINION BELOW

The District Court's opinion is reported at 165 F. Supp. 600. And see R. 57-82.

JURISDICTION

This suit was initiated in the Fifth Judicial District Court in the State of Nevada in and for the County of Mineral, summons and complaint being served on the Attorney General of the United States on December 7, 1955 (R. 101). Jurisdiction of the State court was asserted under the Nevada Declaratory Judgment Act, Section 9440, Nevada Compiled Laws, 1929, and

under Section 666, 43 U.S.C. The suit was timely removed by the United States to the United States District Court for the District of Nevada. (R. 101-109.) Subject to appellee's objections to jurisdiction based on lack of consent to be sued and non-justiciability of the controversy, the District Court's jurisdiction rests on 28 U.S.C. § 1331 and § 1441. The jurisdiction of this Court is invoked under 28 U.S.C. § 1291.

QUESTIONS PRESENTED

1. Whether a suit by a State seeking a determination that the United States in the performance of its constitutional functions must conform to the police regulations of the State, when there is involved no interference with rights of property, contract, or person of the complainant State or any person, presents a justiciable controversy.

2. Whether the United States has consented to be sued under the circumstances of this case.

3. Whether the United States must obtain permission from the State of Nevada before it can lawfully make use of percolating ground waters developed in its own wells, drilled at its own expense, upon its reserved lands constituting the Hawthorne Naval Ammunition Depot, of which area Nevada has ceded exclusive legislative jurisdiction to the United States, and which waters are required to provide a water supply for beneficial uses necessary to accomplishment of the purposes of said Depot.

STATUTE INVOLVED

Section 666, 43 U.S.C., enacted as a rider to the Department of Justice Appropriation Act, 1953 (C. 651, Title II, Sec. 208, 66 Stat. 560), provides as follows:

(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

The relevant portions of other federal and state statutes which are especially pertinent to the argument herein are contained in Appendix B.

STATEMENT

The facts material to this controversy, all agreed to by the parties and set forth in a written Stipulation of

Facts filed with the Court prior to trial (R. 44-57), are stated in some detail in the District Court's opinion (R. 58-64). For the convenience of the Court they are restated here.

Prior to the year 1935, the United States of America, for purposes of the National Defense, established near the Town of Hawthorne, in Mineral County, Nevada, a United States Naval Ammunition Depot. At all times since its initial establishment this Ammunition Depot has been, and it now is, operated and maintained by, and under the jurisdiction of, the Department of the Navy as a major installation in the program of that Department for the Defense of the Nation (R. 44-45).

Title to the lands comprising the Hawthorne Naval Ammunition Depot was first acquired by the United States in 1848, by cession from the United Mexican States under the Treaty of Guadalupe Hidalgo. With minor exceptions not here material, such title has at all times since its original acquisition in 1848 continued to and it now does reside in the United States (R. 45-46).

The said lands comprising the Hawthorne Naval Ammunition Depot have from time to time on and before February 4, 1935, been withdrawn by executive order under authority of acts of Congress from settlement, location, sale, entry and all forms of appropriation, for the exclusive use and benefit of the United States Navy for the development of and use in connection with the Depot. The first such withdrawal was made on October 27, 1926, and the last on February 4, 1935. At all times since the dates of the several withdrawals, the lands covered thereby have been held and administered by the United States as essential parts of the Depot (R. 46).

Upon admission of Nevada into the Union, the people of that State, in its behalf, by ordinance enacted and adopted on July 28, 1864, as a part of the State Constitution, did

> forever disclaim all right and title to the unappropriated public lands lying within said territory.

That ordinance, enacted "In obedience to the requirements of an act of the Congress of the United States, approved March twenty-first, A. D. eighteen hundred and sixty-four" was, by its own express terms as well as by the terms of the Act of Congress referred to,

> irrevocable, without the consent of the United States * * *. [R. 46-50.]

By an act of its legislature approved March 28, 1935, the State of Nevada ceded to the United States exclusive jurisdiction "upon and over the land and within the premises" of the Hawthorne Naval Ammunition Depot, reserving only the power to tax private property situated, and to serve process, within the premises. This cession of jurisdiction has been at all times since March 28, 1935, and it now is in full force and effect (R. 50-52).

Between approximately February 15, 1942, and September 15, 1945, the United States drilled and put into operation six wells within the boundaries of the Depot (R. 52). These wells were drilled upon lands the title to which had been in the United States at all times since 1848 (R. 45-46) and which had been withdrawn and reserved for the development of and use in connection with the Depot (R. 46) as hereinabove noted. They were and are required in order to provide a water supply for beneficial uses necessary to accomplishment of the purposes of the Depot (R. 52).

The waters tapped and developed by these wells were and are percolating waters, and the development and operation of the wells does not interfere, and has at no time interfered, with any vested right of any person (R. 52).

Although the said wells had been constructed and operated since their construction by the United States without regard to the statutes of Nevada relating to the appropriation and use of underground waters, the Commanding Officer of the Depot, on or about July 29, 1949, filed in the Office of the State Engineer of Nevada an application for permit to appropriate to beneficial use the waters of each of said wells and thereafter took further proceedings as provided for by the Nevada statutes relating to the appropriation of underground waters (R. 52-54). However, on July 25, 1955, the Commanding Officer of the Depot advised the State Engineer that "the applications for water rights with regard to the wells are being dropped and no continuing action is expected." (R. 54-55). On September 7, 1955, the State Engineer made an order in which he declared that in his opinion the use of ground water from said wells was contrary to the laws of the State of Nevada and illegal, and he ordered that "unless steps be taken within thirty (30) days" [to comply with the Nevada ground water law] "the use of water from said wells cease." (R. 55.) The United States, believing the Nevada law inapplicable and the State Engineer without jurisdiction in the premises, has not complied with that order (R. 55-56).

During the years 1954 and 1955 two additional wells were drilled by the United States on the Hawthorne Naval Ammunition Depot. Those wells are in the same status as the six wells drilled earlier, except that

no application of any kind was made to the State Engineer with respect to them (R. 88).

Upon failure of the United States to comply with the State Engineer's order of September 7, 1955, within the time therein specified, the State of Nevada, under asserted authority of § 666, 43 U.S.C., and for the purpose of securing a judicial determination "of its rights, status, and legal relations under its laws pertaining to the appropriation to beneficial use of the underground waters of said State by the United States and its government" (R. 3), filed its complaint for declaratory judgment against the United States of America in the Fifth Judicial District Court in the State of Nevada in and for the County of Mineral. By that complaint Nevada sought judgment declaring, *inter alia,* that the underground waters within the Depot are the property of the State of Nevada and the public within its boundaries, and that the use of said waters by the United States is contrary to the laws of Nevada and illegal (R. 18-19).

Summons and the complaint were served on the Attorney General of the United States on December 7, 1955 (R. 101). On December 27, 1955, the cause was removed to the United States District Court for the District of Nevada (R. 101-109). Appellee's motion to dismiss based on failure to state a claim on which relief could be granted and lack of consent to be sued was overruled and the matter proceeded to trial (R. 110-112, 113-114). The United States' objections to jurisdiction were preserved in its answer (R. 37-38). Prior to the trial, the parties filed the stipulation of facts which appears at pages 44-57 of the printed record and at the trial on January 14, 1957, additional facts were stipulated. The matter was submitted on the facts

so agreed to and admitted by the pleadings (R. 92). On August 27, 1958, the District Court filed a written opinion determining on the merits that the complaint be dismissed (165 F. Supp. 600; R. 57-82), and on October 6, 1958, the Court entered its Findings of Fact, Conclusions of Law, and Judgment in accordance with that opinion (R. 85-92). Notice of appeal to this Court was filed on December 5, 1958, (R. 93).

SUMMARY OF ARGUMENT

I

The court below should have dismissed appellant's complaint for lack of jurisdiction. The controversy presented is nonjusticiable because there is involved no injury, or threat of injury, to rights of property, contract, or person, and the question whether Nevada's laws regulating the use of underground water are enforceable against the United States within the Hawthorne Naval Ammunition Depot is purely a political question, not meet for judicial settlement. Furthermore, § 666, 43 U.S.C., upon which appellant relies for consent by the United States to be sued, consents only to joinder of the United States as a defendant in suits for general adjudication of the relative rights of the several users of water of a river system or other source, where it appears that the United States is a necessary party because it is the owner of or in the process of acquiring rights to the use of water. This is not such a suit. On the contrary, appellant seeks a determination that the United States has *no* right to use the waters in question. The United States has not consented to be sued in cases of this kind.

II

If jurisdiction be assumed, then the district court's judgment of dismissal on the merits must be affirmed. In the first place, Nevada's underground water law has no application within the Hawthorne Naval Ammunition Depot because Nevada ceded exclusive jurisdiction over the area to the United States even before the law which she seeks to enforce was enacted. By this cession of jurisdiction Nevada's authority to legislate with respect to the area was terminated, except for the reserved power to tax private property. Even had the Nevada statute been in effect at the time jurisdiction was ceded, it would still not be enforceable within the area by Nevada. For the "international law rule," whereby some laws of the former sovereign authority existing at the time jurisdiction is ceded continue in effect until abrogated or changed by the new sovereign, does not apply with respect to State laws which require administrative action on the part of State officials. Even those pre-existing laws which do continue in effect within the ceded area are effective only as laws of, and are to be enforced by, the sovereignty to which jurisdiction is ceded.

III

But without regard to the matter of legislative jurisdiction, the United States in the performance of its constitutional functions need not comply with the police regulations of a State. Here it is admitted that the wells in question are required in order to provide a water supply for beneficial uses necessary to accomplishment of the purposes of the Depot, a major installation in the program of the Department of the Navy for the defense of the Nation. The fact that

the United States would be required to compensate if by its use of the underground waters there were an invasion of vested rights of others—a possibility which under the facts of this case is not even suggested—does not mean that the United States may perform its functions within the reservation, using the waters there found as necessary for the performance of those functions, only if and as permitted by Nevada law.

IV

Appellant's assertion of ownership of the ground waters underlying the Hawthorne Naval Ammunition Depot cannot be sustained. The waters tapped by the Navy wells are percolating waters and as such are part and parcel of the soil itself. Ownership thereof, or of the right to use the same, cannot be separated from the ownership of the land. But without regard to the stipulated fact that these underground waters are percolating waters, they are appurtenant to the reserved lands of the United States and the United States' right to use the same is not subject to control by Nevada. Title to the lands on which the wells are drilled, and to substantially all the lands within the reservation, has been continuously in the United States since their cession by Mexico in 1848. Title to the right to use the waters appurtenant to those lands continues in the United States today unless the United States has disposed thereof. The United States' ownership of the public lands in Nevada and of the right to use the waters appurtenant thereto did not pass to the State upon Nevada's admission into the Union—the people of Nevada, as required by the Enabling Act, expressly disclaimed "all right and title to the unappropriated public lands lying within said territory." Appellant's

assertion of ownership by reason of the Desert Land Act of 1877 and related acts of 1866 and 1870 is misplaced. In the first place, these acts apply only with respect to the "public lands." They do not apply with respect to unappropriated waters on lands withdrawn from the public lands and reserved for governmental purposes of the United States. In the second place, there is nothing in these acts which can be construed as a grant of title from the United States to the States. The purpose of the Acts of 1866 and 1870 was merely recognition and sanction of *possessory rights* on public lands asserted under local laws and customs. The Desert Land Act severed, *for purposes of private acquisition,* soil and water rights on public lands, and provided that such water rights were to be acquired in the manner provided by the law of the State of location. This was done in furtherance of the land disposal policy of the United States in the Desert Land States. But there is nothing in any of these acts which in any way limits the right of the United States to use the unappropriated waters prior to their appropriation by the public or which in any way authorizes the States to regulate or control the use by the United States of such waters. Since title to the right to use the unappropriated waters on the public and reserved lands of the United States has not been transferred to the States such title remains in the United States, free of any right or authority in the States to control the United States' use thereof. Section 666, 43 U.S.C., was intended merely to waive the sovereign immunity of the United States in a specified kind of suit. It is not a substantive law. Even if it were applicable to a case such as this, it was not intended to, and it does not, mean that the United States, when sued under its as-

serted authority, may not rely upon the Constitution and laws of the United States as sources of right and authority.

ARGUMENT

The trial court's decision on the merits is correct. However, we believe the case does not present a justiciable controversy and that the court below lacked jurisdiction also because the United States has not consented to be sued under the circumstances of this case. The first section of this brief is therefore devoted to a statement of the reasons why we believe the district court should have dismissed for lack of jurisdiction without considering the merits of the controversy.

I

The Court Below Had No Jurisdiction of the United States or of the Subject Matter of the Action.

A. *The controversy presented by the pleadings and the stipulated facts is not a justiciable controversy.*

"The development and operation of said wells does not interfere, and has at no time interfered, with any vested right of any person."

So it has been stipulated (R. 52).

Essentially, Nevada's complaint says no more. For it does not assert that the use by the United States of the ground waters under the Hawthorne Naval Ammunition Depot has impaired, does impair or threatens to impair the vested rights of any other water user or users.[1]

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[1] At page 17 of appellant's opening brief, it is stated that at the trial it was agreed by counsel for the United States "that two wells had been drilled by and in the Town of Hawthorne tapping the underground waters, one well senior in time and one junior in time to the six Navy wells, the waters of which were appropriated

It is therefore apparent that there is presented here for determination "no case of private rights or private property infringed, or in danger of actual or threatened infringement * * *." *Georgia* v. *Stanton,* 73 U.S. (6 Wall.) 50, 77 (1867). There is no "honest and actual antagonistic assertion of rights by one individual against another." *Muskrat* v. *United States,* 219 U.S. 346, 359 (1911). Nor is there any assertion of such

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according to law." There is nothing in either the printed record or in that part of the record in the district court omitted from the printed record which supports this statement. No such agreement was made. No such fact was proved. No such fact was alleged. The only wells referred to in the pleadings or in the agreed facts are the wells drilled by the United States on the reservation area and the stipulated fact is that "the development and operation of said wells does not interfere, and has at no time interfered, with any vested right of any person." When, at the trial, counsel for appellant requested a stipulation that two wells had been drilled by the City of Hawthorne on City of Hawthorne land, counsel for the United States responded: "If your Honor please, the United States is prepared to go to trial in this case on the issues framed by the pleadings. We do not consider relevant to the issues, as stated by plaintiffs, the wells of the City of Hawthorne. We have a particular conviction in that connection, in view of the failure of the complaint to allege any conflict between uses made by the United States and any uses made by any other water user in the area. As your Honor suggested in his remarks, we feel that so far as the pleadings and the stipulated fact with respect to non-interference with other water users are concerned, it doesn't make any difference how many other wells there are in the area. We would have some concern if evidence as to the existence of the City of Hawthorne wells were to be received in the case, as to whether that, by implication or any other manner, injects an additional issue in the case which isn't presently in, and for that reason we would object vigorously to the offer of evidence of that kind under the present pleadings, and we would also object to the amendment of the pleadings at this time to include an allegation with respect to the city's wells." (Transcript of Proceedings, January 14, 1957, pp. 4-5). The district court did not accept appellant's Proposed Amendment to Finding of Fact No. XI (R. 83). This refusal was eminently proper because there was no evidence to support the proposed finding and there was no issue to which it was relevant.

rights by plaintiff in its own behalf or in behalf of any of its citizens. *Arizona* v. *California,* 298 U.S. 558, 566 (1936).

That "the rights in danger * * * must be rights of persons or property, not merely political rights" in order to call for or permit exercise of the judicial power has long been recognized. *Georgia* v. *Stanton, supra,* at page 76.

Nevada does ask a declaration that the undergound waters within the Depot are the property of and belong to the State, a proposition which as a matter of law cannot be sustained. *Infra,* pp. 57 *et seq.* But we think it is clear that she does not seriously contend for more than that in exercise of the police power of the State she may control the use of such waters.[2] She does not assert any use by her that is being injured or thwarted. She says only that the actions by the United States are "illegal." Since no use by any other water user has been impaired, the complaint plainly involves only asserted control by the State in the exercise of police regulations.

It is even more clear that the ultimate question for decision on the merits is whether the United States in the exercise of its constitutional functions relating to the national defense—on a federally-owned military reservation over which the State has ceded, for all purposes here material, exclusive legislative jurisdiction—must conform to such police regulations of the State.

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[2] There can really be no question but that the Nevada ground water law is referable to the police power of the State. *Vineyard Land & Stock Co.* v. *District Court,* 42 Nev. 1, 171 Pac. 166, 173, 174 (1918); *Pacific Live Stock Co.* v. *Lewis,* 241 U.S. 440, 448, 449 (1916); *In re Maas,* 219 Cal. 422, 424, 27 P. 2d 373 (1933); Kinney on Irrigation and Water Rights, 2d Ed., vol. 3, sec. 1341, pp. 2428, 2429; Wiel, Water Rights in the Western States, 3rd Ed., vol. 2, sec. 1184, p. 1097; 30 Am. Jur., Irrigation, sec. 3, p. 851.

The Supreme Court of the United States has often considered the fundamental question, and has always answered in the negative.[3] Contrary to the implications of appellant's opening brief (see particularly the appendix thereto), there is no law of the United States applicable here similar to Section 8 of the Reclamation Act of 1902 (43 U.S.C. § 383) directing conformity to State law. Even if there were, it would not operate to bar the United States from using the water in question in the performance of its functions on this reservation, but would simply require that compensation be paid to the owners of rights recognized under the law of the State if those rights were invaded by the United States' use. *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275, 291 (1958). And see *United States* v. *Gerlach Live Stock Co.,* 339 U.S. 725 (1950).[4]

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[3] Constitution of the United States of America, Art. VI, Cl. 2:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Arizona v. *California,* 283 U.S. 423, 451 (1931):

> The United States may perform its functions without conforming to the police regulations of a State.

Oklahoma v. *Atkinson Co.,* 313 U.S. 508, 534-535 (1941):

> * * * And the suggestion that this project interferes with the State's own program for water development and conservation is likewise of no avail. That program must bow before the "superior power" of Congress. * * *

And see *Florida* v. *Mellon,* 273 U.S. 12, 17 (1927), and *infra,* pp. 49-56.

[4] Thus even were it true that Nevada is the owner of a usufructuary right in the waters in question and that that right is being invaded by the United States, the United States' use would not be unlawful. On the contrary, there would be a taking by the United States by inverse condemnation, Nevada would have an adequate

But this is not an appropriate case even to consider the answer to that fundamental question on its merits. For here there is not presented a disputed question of "rights of persons or property" such as is necessary to bring into play an exercise of the judicial function involving a resolution of the question.

Rather, we submit, the matter presented here is "not meet for judicial determination." *Colegrove* v. *Green,* 328 U.S. 549, 552 (1946). It is not unlike the question presented in *Georgia* v. *Stanton, supra,* p. 13, where the plaintiff State sought to enjoin the Secretary of War and other executive officers of the United States from carrying into execution certain acts of Congress which, it was contended, would destroy the corporate existence of the State by depriving it of the means whereby its existence might and otherwise would be maintained. The bill was dismissed on the ground that the question presented called for judgment on a political, as distinguished from a judicial, question. In distinguishing its decision in an earlier case between sovereign States, the court, at page 73, said:

> The objections to the jurisdiction of the court in the case of Rhode Island against Massachusetts

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remedy under the Tucker Act, and she could not have the relief she seeks here. As the Supreme Court said in *Berman* v. *Parker,* 348 U.S. 26, 36 (1954):

> * * * The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of taking.

And in *Larson* v. *Domestic & Foreign Corp.,* 337 U.S. 682, 697 (1949): "Where the action against which specific relief is sought is a taking or holding of the plaintiff's property, the availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment." And see *Hurley* v. *Kincaid,* 285 U.S. 95 (1932); *Crozier* v. *Krupp,* 224 U.S. 290 (1912); *Yearsley* v. *Ross Construction Co.,* 309 U.S. 18 (1940).

were, that the subject-matter of the bill involved sovereignty and jurisdiction, which were not matters of property, but of political rights over the territory in question. They are forcibly stated by the Chief Justice, who dissented from the opinion. [12 Peters, 752, 754.] The very elaborate examination of the case by Mr. Justice Baldwin was devoted to an answer and refutation of these objections. He endeavored to show, and we think did show, that the question was one of boundary, which, of itself, was not a political question, but one of property, appropriate for judicial cognizance; and, *that sovereignty and jurisdiction were but incidental,* and *dependent upon the main issue in the case.* The right of property was undoubtedly involved; * * *. [Emphasis supplied.]

And from the opinion of Mr. Justice Thompson in *Cherokee Nation* v. *Georgia,* 30 U.S. (5 Peters) 1 (1831), the Court at page 75, 73 U.S., quoted with approval: " 'This court can grant relief so far, only as the rights of persons or property are drawn in question, and have been infringed'."

With respect to the bill before it, the Court said at page 77:

> That these matters, both as stated in the body of the bill, and, in the prayers for relief, call for the judgment of the court upon political questions, and, *upon rights, not of persons or property, but of a political character,* will hardly be denied. For the rights for the protection of which our authority is invoked, *are the rights of sovereignty,* of *political jurisdiction,* of *government,* of *corporate existence as a State, with all its constitutional powers*

> *and privileges.* No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court. [Emphasis supplied.]

The fact that the bill averred that the plaintiff would be deprived of the possession and enjoyment of certain State-owned property was insufficient to make a judicial question where it was apparent the references to such property were merely incidental to the main purpose of having declared the relative rights of sovereignty.

Texas v. *Interstate Commerce Commission,* 258 U.S. 158, 162 (1922), is also in point. The question presented was whether certain powers given by Congress to the Interstate Commerce Commission and the Railroad Labor Board were within the field reserved to the States. The Court said:

> Obviously this part of the bill does not present a case or controversy within the range of the judicial power as defined by the Constitution. It is only where *rights,* in themselves appropriate subjects of judicial cognizance, are being, or about to be, affected prejudicially by the application or enforcement of a statute that its validity may be called in question by a suitor and determined by an exertion of the judicial power. *Georgia* v. *Stanton,* 6 Wall. 50, 73 et seq.; *Muskrat* v. *United States,* 219 U.S. 346, 361; *Stearns* v. *Wood,* 236 U.S. 75, 78.

Laying aside for the moment the political nature of the issue presented by the complaint, the practical tone

of Nevada's argument on appeal seems to be one of fear that some day the Navy wells might interfere with uses by other water users. Appellant's Opening Brief, pp. 50-51.[5] She is not concerned with any present or threatened physical injury (R. 52). Her fears stem solely from speculation as to future activities of the United States and from speculation as to future uses by others. There is nothing in the record to indicate that those fears will ever be realized. We have shown *supra,* at footnote 1, that appellant's reference even to the existence of the City of Hawthorne wells is not proper in the light of the record in this case. Even if their existence were judicially noticeable and Nevada were able in a suit like this to litigate the City's rights (both of which propositions we deny), there is no evidence of any relationship between them and the United States' wells and the agreed fact is that there is no interference with any vested right with respect to them or with any other vested right (R. 52). As a result Nevada's complaint, even if capable of amendment by her brief on appeal, is grounded solely on assumption.

A complaint based merely upon "assumed potential invasions" of rights is not enough to warrant judicial intervention. See *Arizona* v. *California,* 283 U.S. 423, 426 (1931). There, Arizona claimed that the congressional act providing for the construction of what is now

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[5] Appellant says: "It is clear that no priority of use of the waters in question was established under State law. If not so established, then when such priority of use is or may be questioned by any interested party whose right to the beneficial consumptive use of the waters of the same or adjacent underground basin was or is perfected under the same State law, is curtailed or jeopardized by the use of the Navy Wells, what law will then be the rule of decision?" We submit that that question will be appropriate for decision when, *but not until,* an interested party does complain that his rights are "curtailed or jeopardized by the use of the Navy Wells."

Hoover Dam would invade her quasi-sovereign rights by preventing the State from exercising its right to prohibit or control under its own laws the appropriation of unappropriated waters flowing within or on its borders. In deciding this cause was not ripe for judicial determination, the Court observed that there was no allegation of definite physical acts that were interfering, or would interfere, with future appropriations by the State. The Court noted further, in connection with State allegations that plans were drawn and permits granted for the taking of additional water in Arizona under its laws, that the acts of the Secretary of the Interior threatened no physical interference with those projects, and that the federal act authorizing the dam and reservoir interposed no legal inhibitions on their execution. 283 U.S. at 462-464. Here, of course, Nevada does not even contemplate using the waters in question for any State project.[6] *A fortiori,* the State has put forth no justiciable cause.

Other cases also illustrate the proposition that the judicial power does not extend to abstract questions having to do solely with the delineation of sovereignty. In *New Jersey* v. *Sargent,* 269 U.S. 328 (1926), the

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[6] Appellant virtually conceded the nonjusticiability of the cause when she noted in her reply brief in the court below that the state engineer "granted" Naval officers a three-year period of time to further study the question of water availability before completing the requirement of filing proofs of beneficial use. She closed her brief by asking: "Does such fact show any disposition on the part of the State and/or its officers to deny use of water to the United States or even to interfere in any manner with such use?" (R. 69). And in her opening brief on appeal, Nevada says at p. 48 that "there is no evidence herein that the powers of the United States for any purpose in the use of the waters, or otherwise, had been, were, or would be interfered with by the State and/or its officers." What, we ask, does Nevada plan to do with the waters in question —*other than issue a permit authorizing the very uses which she has put in issue here?*

Court dismissed the bill of New Jersey which sought to obtain a judicial declaration that in certain features the Federal Water Power Act exceeded the authority of Congress and encroached upon that of the State. And a bill of the United States against West Virginia was dismissed because general allegations that the State challenged the claim of the United States that the rivers in question were navigable, and asserted a right superior to that of the United States to license their use for power production, raised an issue "too vague and ill-defined to admit of judicial determination." *United States* v. *West Virginia,* 295 U.S. 463, 474 (1935).

The Supreme Court's description of an allegation in *New York* v. *Illinois,* 274 U.S. 488, 489 (1927), is an apt description of Nevada's complaint here. "[I]t does not show that there is any present use of the waters * * * which is being or will be disturbed; nor that there is any definite project for * * * using them which is being or will be affected; * * *."

As the matter presented by the allegation there referred to was nonjusticiable, so also is the cause here. For here there is presented for resolution, in the language of the same Court in *United States* v. *West Virginia, supra,* at page 473, no more than a "difference of opinion between the officials of the two governments" whether there is power and authority in the State to control the use by the United States of the waters within its defense establishment.

The fact that this is a suit for declaratory judgment does not put a justiciable complexion on Nevada's asserted cause. The Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, does not change the constitutional requirement for a justiciable case or controversy.

See *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 325 (1936), and *United States* v. *West Virginia, supra.*

B. *The United States of America has not consented to be sued in or otherwise waived its sovereign immunity from suits of this character.*

(1) *No suit against the United States can be maintained in the absence of congressional consent.*

It is elementary that without specific statutory consent no suit may be brought against the United States. *United States* v. *Shaw,* 309 U.S. 495, 500 (1940). "The United States, as sovereign, is immune from suit save as it consents to be sued." *United States* v. *Sherwood,* 312 U.S. 584, 586 (1941). "The rule of immunity of the Federal Government from suit without its consent to be sued is all-embracing and is applicable to all kinds of actions." 54 Am. Jur., United States, sec. 128, p. 635. And see *Minnesota* v. *United States,* 305 U.S. 382, 387 (1938); *Arizona* v. *California,* 298 U.S. 558, 568 (1936); *Belknap* v. *Schild,* 161 U.S. 10, 17 (1896).

The fact that this is a suit for declaratory judgment does not establish jurisdiction. The Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, does not in itself authorize suit against the United States, but provides an additional remedy only where the jurisdiction of the court has already attached by virtue of some other statute. See *Aetna Casualty & Surety Co.* v. *Quarles,* 92 F. 2d 321, 323 (C.A. 4, 1937), wherein the Court said: "The Federal Declaratory Judgment Act * * * is not one which adds to the jurisdiction of the court, but is a procedural statute providing for an additional remedy for use in those cases and controversies

of which the federal courts already had jurisdiction * * *." Particularly pertinent here is the following language of this Court in *Brownell* v. *Ketcham Wire & Manufacturing Co.*, 211 F. 2d 121, 128 (1954): "* * * [*T*]*he Declaratory Judgment Act * * * is not a consent of the United States to be sued,* and merely grants an additional remedy in cases where jurisdiction already exists in the court * * *."

(2) *Section 666, 43 U.S.C., authorizes the joinder of the United States as a defendant only in suits which are* sui generis, *relating to the general adjudication of rights to the use of water of a river system or other source.*

For the consent of the United States to be sued, without which this suit must fail, appellant relies solely on 43 U.S.C. § 666, enacted as a rider to the Department of Justice Appropriation Act, 1953. The full text of the section appears *supra,* pp. 2-3.

But this act does not grant such consent. It authorizes the *joinder* of the United States as a defendant only in suits for the adjudication or administration of rights to the use of water of a river system or other source. This is not such a suit.

"Joinder" is a word of art in the law. It connotes the uniting of two or more parties on one side of a suit. "Joinder of parties" is defined by *Black* as "the uniting of two or more persons as co-plaintiffs or as co-defendants in one suit." And the materials following demonstrate that the term cannot mean otherwise as it is used in § 666.

A suit for the adjudication of water rights is an action *sui generis.* Wiel, Water Rights in the Western States, 3rd Ed., vol. 2, p. 1125; *Holbrook Irrigation*

District v. *Fort Lyon Canal Co.,* 84 Colo. 174, 195, 269 Pac. 574, 582 (1928); *Hough* v. *Porter,* 51 Ore. 318, 439, 98 Pac. 1083, 1109 (1909). Such a suit is common in the law of the western states in one form or another. Wiel, *supra,* pp. 1120, 1125. A characteristic of such a suit is that all known claimants to the water supply involved must be joined and their individual rights determined by the final decree. The reason for this is pointed out by the court's opinion in *Washington State Sugar Co.* v. *Sheppard,* 186 Fed. 233, 235-236 (C.C., D. Idaho, N.D., 1911):

> * * * [I]t is highly important that all claimants to the right to divert the water of a natural stream for beneficial purposes should be brought into the same court in a single action, and therein be required to wage their claims, in order that such claims, necessarily more or less interdependent and conditioned one upon the other, may be settled and defined by a single decree. The cogency of the reasons for such course is so thoroughly appreciated that almost invariably the state courts in the arid region, where the doctrine of appropriation prevails, have shown solicitude and have exercised great care in requiring that all claimants be made parties in suits of this character.

This universal requirement of joinder of all claimants and the general nature of such suits are further illustrated by the opinions of authorities set out in the margin.[7]

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[7] The Supreme Court of the United States, construing the Oregon statute relative to adjudication proceedings: "* * * [T]he proceeding in question is a *quasi* public proceeding, set in motion by a public agency of the State. All claimants are required to appear and prove their claims; no one can refuse without forfeiting his

That this rule is not a requirement of statutory adjudication suits only appears from a recent decision of this Court. In *People of the State of California* v. *The United States of America,* 235 F.2d 647, 663 (1956), this Court said:

> The only proper method of adjudicating the rights on a stream, whether riparian or appropriative or mixed, is to have all owners of land on the watershed and all appropriators who use water from the stream involved in another watershed in court at the same time.
>
> The trial court violated this principle by issuing a declaratory judgment as to the right of the United States as against one claimant whose rights were junior, which had the effect of preventing

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claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end; First, that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights without needless waste or controversy; Second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses with its recognized infirmities and uncertainties, and, Third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators.

* * * * *

"* * * In such a proceeding the rights of the several claimants are so closely related that the presence of all is essential to the accomplishment of its purpose, and it hardly needs statement that these cannot be attained by mere private suits in which only a few of the claimants are present, for only their rights as between themselves could be determined * * *." *Pacific Live Stock Co.* v. *Oregon Water Board,* 241 U.S. 440, 447 *et seq.* (1916).

The Supreme Court of Utah: The state statute providing for water rights' adjudications "was enacted for the purpose of providing a statutory remedy whereby all parties claiming rights to use waters from any given source could be brought before the court so that

> a trial of the other water rights involved without giving a hearing as to the individual owners.

A suit to which the whole number of known claimants to the water supply in question are not joined is not an adjudication suit within the generally accepted meaning therof, or within the meaning of 43 U.S.C. § 666. Neither is a suit such as this.

The legislative history of § 666 shows that the Congress intended to consent to the *joinder* of the United States in general adjudication suits only. The then Chairman of the Senate Committee on the Judiciary stated that the act

> *is not intended to be used for any other purpose* than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream.

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all conflicting claims could be adjudicated in one action." *Spanish Fork West Field Irrigation Co.* v. *District Court of Salt Lake County,* 99 Utah 527, 536, 104 P. 2d 353, 357 (1940).

The Supreme Court of Nevada: "The proceedings under the water law is a quasi-public proceeding wherein all claimants to the use of waters of a stream system may have their claims adjudicated, to the end that the waters of the stream may be distributed under public supervision, without needless waste or controversy." *State ex rel Hinckley* v. *Sixth Judicial District Court,* 53 Nev. 343, 352, 1 P. 2d 105, 106 (1931).

The United States District Court for the District of Oregon: "It is a case where divers and sundry parties are entitled to so much of the waters of a stream as they have put to beneficial use and the purpose is to ascertain their respective rights by a simple, economical, effective and comprehensive proceeding, and it is not a separable controversy between different claimants." *In Re Silvies River,* 199 Fed. 495, 503 (D. Ore., 1912).

Wiel, *supra,* sec. 1222, p. 1120: "In most of the states having special water codes, special statutory proceedings in court are provided, following a method which originated in Colorado, whereby all claimants on a stream are brought into court in a single suit and a decree rendered seeking to fix permanently the rights of each."

> This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value. [Emphasis supplied.] [8]

But in demonstrating the inapplicability here of § 666 we are not restricted to the language of the statute and to the legislative history as disclosed by Senate Report No. 755. In *Miller* v. *Jennings,* 243 F.2d 157, 159 (C. A. 5, 1957), *cert. denied* 355 U.S. 827, 855, suit for declaratory and injunctive relief with respect to asserted rights to use the waters of the Rio Grande River was brought by several water users and the water district of which they were constituents against the United States and other defendants. The Court of Appeals, in affirming the lower court's dismissal of the case, denied plaintiffs' claim of the applicability of § 666 in the following language:

> The United States has not given its consent to be joined as a defendant in every suit involving water rights. It may be made a party only in suits "for the adjudication of rights to the use of water of a river system or other source." There can be an adjudication of rights with respect to the upper Rio Grande only in a proceeding where all persons who have rights are before the tribunal. The Ninth Circuit Court of Appeals has most succinctly stated the doctrine in this manner:
>
> "The only proper method of adjudicating the rights on a stream, whether riparian or appropria-

[8] Report No. 755, 82d Cong., 1st Sess., p. 9. See Appendix A hereto. In that appendix there are set forth additional excerpts from the Report which show that only general adjudication suits were contemplated by the language of the statute in question.

> tive or mixed, is to have all owners of lands on the watershed and all appropriators who use water from the streams involved in another watershed in court at the same time." People of the State of California v. United States, 9 Cir., 1956, 235 F.2d 647, 633. See Pacific Live Stock Co. v. Lewis, 241 U.S. 440, 36 S.Ct. 637, 60 L.Ed. 1084.

A suit for adjudication of water rights within the generally accepted meaning thereof and within the meaning of § 666 is just what Senator McCarran described in his letter to Senator Magnuson, included in Senate Report No. 755, and it is what the Fifth Circuit Court of Appeals described in *Miller* v. *Jennings* —a proceeding to determine the relative rights of all users "on a given stream" or other source.[9] Appellant does not seek such a determination. It does not ask to have its rights to use water determined as against all other users from a source defined for purposes of the litigation.[10]

On the contrary, appellant by her complaint seeks only a determination that the use by the United States of the waters underlying the Hawthorne Naval Ammu-

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[9] In further support of the proposition that only general adjudication suits are within the contemplation of § 666, we again emphasize the use of the word "join" in the first phrase of the statute. Had Congress intended to authorize suits such as this against the United States, it is to be assumed it would not have used language which is adapted only to suits involving more than one defendant.

[10] The failure of the complaint and of the evidence to define a river system or other source of water in which other water users claim conflicting rights (see R. 52) should also be considered in determining the applicability of the statute in question. It is clear from the language of the statute and from the legislative history that only proceedings relating to defined sources of water are contemplated.

nition Depot is illegal under the laws of Nevada. The complaint does not ask a determination of the relative rights of the various water users on a river system or other source. It does not ask an adjudication of water rights.

The congressional consent to suits for adjudication cannot be extended by implication to suits such as this. For "It is not * * * [the court's] right to extend the waiver of sovereign immunity more broadly than has been directed by the Congress." *United States* v. *Shaw, supra,* p. 22, at 502. See also *Belknap* v. *Schild, supra,* p. 22, at 16; *Minnesota* v. *United States, supra,* p. 22. Any contention that the statute should be liberally construed to permit this suit is clearly refuted by the following language of the Supreme Court in its opinion in *Larson* v. *Domestic & Foreign Corp., supra,* p. 16, at 703:

> It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. The Congress has increasingly permitted such suits [for damages] to be maintained against the sovereign and we should give hospitable scope to that trend. *But the reasoning is not applicable to suits for specific relief.* For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons

> of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract rights. [Emphasis supplied.]

Even less, we submit, in a suit which does not even present a disputed question of property or contract right.

Any suggestion that this may be a suit for administration of water rights within the meaning of § 666 even though it is not a suit for adjudication of such rights is not tenable. All that has been said before is equally applicable in this connection. Senate Report No. 755 (Appendix A) makes clear that the reference in the statute to suits for "administration" contemplates situations where the rights to use the waters of a given source have been adjudicated and that the necessity of having all users in court for an effective determination was as much the motivation for consent to suits for administration as it was for consent to suits for adjudication. "Accordingly, all water users on a stream, *in practically every case,* are interested and necessary parties to *any* court proceedings." [Emphasis supplied.] Appendix A, p. 86. The Court of Appeals for the Fifth Circuit in *Miller* v. *Jennings, supra,* p. 27, determined that the suit there was no more a suit for administration than it was for adjudication. If that case was not, surely this cannot be. And the conclusion is obvious that a suit the sole objective of which is to have declared that the United States has *no* right to use the water under the military reservation in question can by no interpretation of the English language be considered a suit for administration of rights.

(3) *Even were this otherwise a suit of the type contemplated by Section 666, 43 U.S.C., the requirements of the statute for joinder of the United States have not been met.*

The consent granted by the statute on which appellant relies is applicable only "where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit." This language is further demonstrative of the purpose to authorize joinder of the United States only in suits to determine the relative rights of a number of water users.

But Nevada's complaint, rather than meeting this requirement of the statute, denies ownership by the United States of any right to use the water in question and asks a declaration that its use thereof is unlawful. It presents the dilemma that if she were correct in her contentions the suit would nevertheless have to be dismissed for lack of jurisdiction because the consent to suit applies only "where it appears that the United States is the owner of or is in the process of acquiring water rights * * *." [11]

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[11] It is not tenable that appellant's complaint satisfies this requirement of the statute because the Commanding Officer of the Depot, after completion of the first six wells and operation thereof for several years by the United States, in 1949 initiated proceedings before the State Engineer under the Nevada ground water law (R. 52-54). Those proceedings were abandoned and the State Engineer was notified accordingly (R. 55). It was this abandonment and notification which activated the filing of Nevada's complaint, and appellant now asserts and seeks a determination that the United States has *no* right to use the waters. No application of any kind has been made to the State Engineer with respect to the two additional wells drilled in 1954 and 1955 (R. 88).

It is respectfully submitted that Nevada's denial that the United States owns any right to the use of the water in question does not state a case which meets this statutory requirement. It might be that such denial constitutes a statement of a controversy with the United States—a controversy which, we have shown, is not justiciable. But the controversy is not one with respect to which Congress has consented to suit.

Authority to support this proposition would seem unnecessary. But the holding of this Court in *United States* v. *McIntire,* 101 F. 2d 650 (1939), is as close to being on all fours as is possible when the subject of decision is a different statute. It was there contended that suit against the United States was given by 28 U.S.C. § 41(25) [now 28 U.S.C. § 1347] which provided: "The district courts shall have original jurisdiction as follows: * * * of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants." At page 653 the Court said:

> Assuming, without deciding, that the word "lands" includes water rights, we think the statute has no application here. The suit is essentially one to determine the validity of the claimed water right, which if valid, might present a question of priority and extent, in that there would then be two rights —one in the United States, and one in appellees McIntire, Pablo and Sterling. However there would be no question as to whether or not the United States owned a part of the latter right, and there is none here. *The right asserted is one which the appellees McIntire, Pablo and Sterling claim*

to own entirely. As such the United States and the named appellees are neither joint tenants nor tenants in common. There being no consent by Congress to the suit, the bill must be dismissed as to the United States. [Emphasis supplied.]

(4) *Section 666, 43 U.S.C., does not consent that suit may be brought against the United States as sole defendant to secure a declaratory judgment relative to the single question of the need for compliance by the United States with the laws of a State respecting the appropriation and use of underground water. Were the statute to be construed as extending such consent, there would be serious doubt as to its constitutionality.*

We have shown that Section 666 is capable of being construed as granting consent *only* to the *joinder* of the United States as a defendant in suits relating to the general adjudication or rights to the use of water of a river system or other source. We have shown that that consent cannot be extended by implication to suits such as this and that there are "the strongest reasons of public policy" which would preclude any such implication. No stronger case than this for application of the language quoted *supra,* at pp. 29-30, from the *Larson* case could be imagined.

But in addition, we have shown that the sole question presented here is not appropriate for judicial determination—that it is beyond the judicial function and the controversy is therefore non-justiciable. If Section 666 were construed as granting the consent of the United States to be made a party defendant in such a suit, the statute's constitutionality would be subject

to serious question. In *Muskrat* v. *United States, supra,* p. 13, at 361, a unanimous court, in denying the validity of the consent to suit act there involved, said:

> * * * [The] judicial power, as we have seen, is the right to determine *actual* controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their *rights* is in conflict with fundamental law. * * * This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a "case" or "controversy," to which, under the Constitution of the United States, the judicial power alone extends. * * * The object [of the action] *is not to assert a property right against the Government, or to demand compensation for alleged wrongs because of action upon its part.* The whole purpose * * * is to determine constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the Government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense, the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question. * * * [Emphasis supplied.]

All this would be applicable here if the statute were to be construed as authorizing this suit. We submit that even if there should appear to the Court to be a real question whether Section 666 might be so construed, that construction should be rejected in favor of the construction under which the statute's validity would not be open to question.

(5) *Section 666, 43 U.S.C., does not consent that the will of the Court or of the Legislature or State Engineer of Nevada be substituted for that of the executive officers of the United States who are charged by law with the administration in the interest of the National Defense of the Hawthorne Naval Ammunition Depot. Were the statute to be so construed, there would be serious doubt as to its constitutionality.*

The prayer of the complaint is for certain declarations of the sovereign rights or powers of the State of Nevada with respect to the ground waters under the Hawthorne Naval Ammunition Depot, and that the use by the United States of those waters, being contrary to the laws of Nevada, is illegal. There is no specific prayer for injunctive relief. Nevertheless, the purpose of the suit is to attempt to restrain the use by the United States of those waters absent compliance with the laws of the State. And this should be considered as a suit for injunctive relief in the effort to determine whether consent is given by Section 666.

To test the accuracy of this analysis, it is necessary only to consider the utter futility of a naked declaration upon the specific questions referred to in the prayer if the Court were not to undertake also to compel by its orders conformity to whatever declarations might be

made. The prayer for such other orders "as shall be deemed meet" (R. 19) is proof enough that the complaint contemplates such relief. And the fact that the test for determining jurisdiction in a suit for declaratory relief is whether the controversy might be entertained if the relief sought were injunctive (*Colegrove et al.* v. *Green, supra,* p. 16, 328 U.S. at 552) indicates the judicial view that injunction is a concomitant of declaratory relief.

In this light, it is appropriate to repeat, emphasize, and re-emphasize these admitted facts.

At all times since its initial establishment, the Hawthorne Naval Ammunition Depot has been, and it now is, operated and maintained by, and under the jurisdiction of, the Department of the Navy as a major installation in the program of that Department for the Defense of the Nation (R. 44-46). The wells in question were and are required in order to provide a water supply for beneficial uses necessary to accomplishment of the purposes of the Depot (R. 52).

In the face of these facts, appellant asks, under purported authority of Section 666, that the United States be directed by the Court to perform its essential constitutional functions at Hawthorne only as the Nevada legislature and, under the State's existing law, her State Engineer may permit the use of the waters necessary therefor.[12]

It is to be emphasized that the validity of no law of the United States relative to the operation of this facility has been challenged. No officer or agent of the United States has been made a party, and no

[12] The fact that appellant suggests no difficulty would be experienced in obtaining such a permit does not alleviate the constitutional problems which granting the relief sought would involve.

question as to the statutory authority of the officers charged by law with operation of the Depot is presented. The only question, for purposes of this portion of the argument, is this: Has the United States consented that the exercise of its constitutional functions may be restrained for lack of compliance with the laws of a State relative to the use of water necessary for the performance of these functions?

We have reviewed briefly, *supra,* p. 15, the authorities demonstrating that the United States in the performance of its functions need not conform to the police regulations of a state. And see *infra,* pp. 49-56. We have shown also, at footnote 4, that if there were an invasion by the United States' use of the waters in question of property rights of the plaintiff or of her citizens, the Tucker Act affords an adequate remedy and no case for specific relief could be made. The reasoning of the cases wherein the courts have denied their authority to control the executive officers of the United States in the exercise of discretionary powers validly conferred by statute is also relevant to this consideration.[13]

Thus, in *Hudspeth County Conservation & Reclamation District No. 1* v. *Robbins,* 213 F. 2d 425, 432 (C.A. 5, 1954), *cert. denied* 348 U.S. 833, the court said:

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[13] See, *e.g., Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 170 (1803); *Decatur* v. *Paulding,* 39 U.S. (14 Peters) 497 (1840; *Riverside Oil Co.* v. *Hitchcock,* 190 U.S. 316, 324 (1903). It is also to be noted that no statute of the United States has been cited authorizing the Secretary of the Navy or his subordinates to follow the procedure for which Nevada contends. Specific statutes applicable to other activities of the United States have no application with respect to the use of water on military reservations. As noted *supra,* p. 15, even a statute like Section 8 of the Reclamation law, if applicable here, would not support the relief which appellant seeks.

> * * * Whatever may be the merits of the plaintiffs' contentions, the court would have no jurisdiction by declaratory judgment, see *Lynn* v. *United States,* 5 Cir., 110 F. 2d 586, 588, or by injunction against Government officers to substitute itself in any part of the management and operation of the dams, reservoirs and facilities for the agency designated by Congress. * * *

In *New Mexico* v. *Backer,* 199 F. 2d 426, 428 (1952), the Tenth Circuit Court of Appeals stated the problem in this language:

> The Rio Grande Reclamation Project was constructed and operated in the exercise of a proper governmental function and in accordance with valid statutes of the United States. The facilities were owned by the United States and the waters were stored in the reservoir to be withdrawn by the United States for authorized governmental purposes. The management, control, and operation of such facilities are given the Secretary of the Interior in broad terms, 43 U.S.C.A. § 373. The United States could not hold or operate this vast project except through its officials and agents. Backer was performing these functions for the Secretary of the Interior and under his instructions. Whatever he did, he did for the Secretary under authority of the reclamation laws of the United States. The operation of the project and facilities depended upon the flow of water from the reservoir. If this flow could be enjoined or affected by court decree or order directed to Backer, he would be under the direction of the court and not his superiors as representatives of the United States.

> It would be a complete ouster of the United States over the control and management of its own property and facilities.

And we repeat here the language of the Supreme Court in the *Larson* case, hereinabove quoted at pages 29-30:

> * * * For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. *There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign.* The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract rights. [Emphasis supplied.]

Although in *Belknap* v. *Schild, supra,* p. 29, at 17, the Supreme Court said "unless expressly permitted by act of Congress, no injunction can be granted against the United States," it is of the utmost significance that neither in that case nor in any other decision of an appellate court has it been found that the Congress has extended such permission.[14]

In the face of these precedents, it is inconceivable

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[14] The opinion of the United States District Court for the Southern District of California in *Rank* v. *Krug,* 142 F. Supp. 1, represents the only declaration which has been found by *any* court to the effect that Congressional consent to injunction against the United States has been granted. That case is now pending on appeal to this Court, No. 15840.

that there can be found by implication [15] in a statute "not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream," [16] the consent by Congress that the Government *can* be stopped in its tracks by *any* plaintiff who presents *any* disputed question of property or contract rights relating to the use of water. Much less can there be found by implication in that statute the consent of Congress that the Government can be stopped in its tracks by a State, presenting not a question of property or contract rights, but only a question of failure to comply with the police regulations of the State relating to the use of water.

The statute in express terms permits joinder of the United States as a defendant only in suits for the adjudication of rights to the use of water of a river system or other source, or for the administration of such rights. There is no reference to actions such as this for injunctive or declaratory relief. That is in keeping with the view expressed by the Supreme Court in the *Larson* case that *"There are the strongest reasons of public policy for the rule that such* [injunctive] *relief cannot be had against the sovereign."*

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[15] "It [permission to sue the United States] will not be implied * * *." *North Dakota-Montana Wheat Growers' Assn.* v. *United States*, 66 F. 2d 573, 577 (C.A. 8, 1933), *cert. denied* 291 U.S. 672.

[16] The language immediately preceding that quoted from Senator McCarran's letter to Senator Magnuson is also especially significant: "S. 18 is not intended to be used for the purpose of obstructing the project of which you speak or any similar project * * *." See Appendix A, p. 89. And see page 6 of the Report (Appendix A, p. 87): "The committee, for the legislative history of this bill, definitely desires to repudiate any such intent which may be deduced from S. 18 and states that this is not the purpose and the intent of this legislation."

[Emphasis supplied.] Since neither injunctive nor declaratory relief is expressly provided for, it necessarily follows that Congress has not waived the immunity of the United States from suits of this character, for, as discussed above: "[The United States] cannot be subjected to legal proceedings, at law or in equity, without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress." *Belknap* v. *Schild, supra,* p. 29, 161 U.S. at 16.

Were Section 666 to be construed otherwise, additional constitutional questions would be presented. Among such would be the question whether Congress can constitutionally delegate to the courts supervision of the performance by the executive branch of its functions in the operation of a defense establishment such as Hawthorne. Since relief is sought against the United States rather than against specified officers, it must be assumed that judgment for the plaintiff would of necessity, to be effective at all, be binding upon all executive officers, including the President, and perhaps also upon the Congress. The problem would be similar to those dealt with by the Supreme Court in *Mississippi* v. *Johnson,* 71 U.S. 475 (1866), and by Judge Pope in his concurring opinion in *United States* v. *United States District Court,* 206 F. 2d 303 (C.A. 9, 1953). *Cf. Marbury* v. *Madison, supra,* footnote 13; *Decatur* v. *Paulding, supra,* footnote 13; *Martin* v. *Mott,* 25 U.S. 19, 31 (1827); *Riverside Oil Co.* v. *Hitchcock, supra,* footnote 13; *United States* v. *Ide,* 277 Fed. 373, 382 (C.A. 8, 1921), *affirmed* 263 U.S. 497 (1924); 11 Am. Jur., Const. Law, p. 889, § 190, footnote 1; p. 887, § 188. Congress may not waive the sovereign immunity where the result would be to transfer to the judiciary powers

which under the Constitution repose in the executive branch of the Government. *Cf. Myers* v. *United States,* 272 U.S. 52 (1926). The doctrine of separation of powers which precludes the legislative branch from assuming to itself executive powers, *Springer* v. *Philippine Islands,* 277 U.S. 189 (1928), also forbids the transfer of such powers to the judiciary. The authorities discussed *supra,* Part I, A, are also relevant here.

There would be the related question whether Congress can constitutionally delegate to the States, by submitting the United States to suit for specific relief, the power to control, and even to prohibit, by their legislation the actions of Federal officers in performing the constitutional functions of the United States.[17] We note again that a direction to Federal officers to recognize rights vested under State law by the payment of compensation therefor when the same are impaired by the United States (see *supra,* page 15) is quite different from consent to injunctive relief against the use of water if state procedures for appropriation are not followed to acquire an appropriative right to such use.

There would also be the related question whether Congress can constitutionally deny, by permitting specific relief for failure to acquire its rights to the use of water under state appropriation laws, the United

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[17] There is nothing in the recent case of *United States* v. *Sharpnack,* 355 U.S. 286 (1958), which would sanction a delegation. The act under fire there and upheld by the Court adopted certain state law into that body of *federal* law which was to govern *federal* officials in the administration of *federal* justice. Here, however, Congress would be abdicating the powers of the United States rather than exercising them by an adoption process. Constitutional functions of the United States would be subjected to the operation of *state* legislation as administered and interpreted by *state* officials. Nevada would thus be wielding *direct* authority over Constitutional functions of the United States.

States' power of eminent domain to take such property rights as are required for the performance of its functions. The existence of Nevada's Act of March 28, 1935, ceding exclusive jurisdiction to the United States, and the fact that Nevada's claim of ownership of the waters under this reservation of the United States, *infra,* pp. 57 *et seq.* is clearly erroneous, sugggest that if Section 666 were construed as authorizing suit to compel compliance by the United States with the Nevada underground water law, there would be still other questions regarding the statute's validity. We submit that, in the light of the plain intention of Congress to consent only to joinder of the United States in general adjudication suits, as evidenced by the language of the statute and its legislative history, a construction of Section 666 which presents constitutional questions such as would be presented by application of the statute to this case should be denied.

In the following discussion of the merits of the matter, additional references to Section 666 will be made from which it will be even further apparent that Congress did not intend that that statute be construed as applying to a case such as this.

II

By Her Cession to the United States of Exclusive Jurisdiction "Upon and Over the Land and Within the Premises" of the Hawthorne Naval Ammunition Depot, Nevada Has Completely Removed That Area, Except for the Reserved Power of Taxation, from the Reach of Her Legislative Powers and from the Area Wherein She Can Enforce Her Legislative Enactments. There is Nothing in § 666, 43 U.S.C., Which Permits a Different Conclusion.

Wholly apart from the question of ownership of the right to use the ground waters under the Hawthorne

Naval Ammunition Depot, and wholly apart from the question whether the State of Nevada can control the operation by the United States of its functions on that reservation, there is a compelling reason, not relied on by the court below, why the relief sought cannot be granted even were the cause justicable and § 666, 43 U.S.C., were construed as authorizing suits such as this.

By an act of her legislature approved March 28, 1935 (R. 50-51), Nevada ceded to the United States exclusive jurisdiction "upon and over the land and within the premises" of the reservation, reserving only the power to tax private property situated, and to serve process, within the premises. This cession of jurisdiction has at all times since the date of the act been in full force and effect (R. 52).

The United States claims no property rights by reason of this cession of jurisdiction. Indeed, since, as we shall show, Nevada had no right of property in the lands within the reservation or the waters underlying the lands when the cession act became effective, she could have transferred no property right even if the act were capable of being construed as a grant of property—which is not the case.

The effect of Nevada's Act of March 28, 1935, was this: The area within the Hawthorne Naval Ammunition Depot was removed from the area subject to the State's jurisdiction except for the powers to tax privately-owned property and to serve process which were reserved. The power to legislate and to enforce legislative enactments within the area encompassed by the Act was transferred to the United States.[18]

[18] "When the Federal Government has acquired exclusive legislative jurisdiction over an area, by any of the three methods of

Appellant's contention that she ceded jurisdiction only over the land and not over the waters within the boundaries of the reservation is disproved by the language of the act itself. She ceded jurisdiction "upon and over the land and within the premises" of the Depot, subject to express reservations which do not include the power to regulate the use of water.

Had Nevada in settlement of a boundary dispute with California made a similar cession to that State over the disputed area, we think there would be no question but that Nevada's power to control the use of underground water within the area would be terminated. By her transfer of jurisdiction to the United States, appellant divested herself of power to legislate with respect to the area just as effectively as she would have done by a cession to California. Her power to enact laws, other than property tax laws, applicable within the boundaries of the reservation came to an end.[19]

In *Standard Oil Co.* v. *California,* 291 U.S. 242, 244 (1934), the Supreme Court in language applicable

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acquiring such jurisdiction, it is clear that the State in which the area is located is without authority to legislate for the area or to enforce any of its laws within the area. All the powers of government with respect to the area are vested in the United States. *Pollard* v. *Hagan,* 3 How. 212, 223 (1845)." (Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States, Part II, A Text of the Law of Legislative Jurisdiction, June, 1957, p. 169. And see following pages of that work.)

[19] Since Nevada had no law purporting to control the use of percolating waters (*Cf.* Section 1 of the Act of March 24, 1915, Nev. Comp. Laws, 1929, Sec. 7987, Appendix B, p. 95,) until she adopted her underground water law in 1939 (Ch. 178, Nev. Laws, 1939), it would appear clear beyond dispute that the law which she seeks here to enforce can have no application within the enclave. We note further, however, that even though "It is a general rule of public law * * * that whenever political jurisdiction and legislative power over any territory are transferred from one

here stated the effect of a cession of jurisdiction similar to that in this case in these words:

> In three recent cases * * * we have pointed out the consequences of cession by a State to the United States of jurisdiction over lands held by the latter for military purposes. Considering these opinions, it seems plain that by the Act of 1897 California surrendered every possible claim of right to exercise legislative authority within the Presidio—put that area beyond the field of operation of her laws. Accordingly, her legislature could not lay a tax upon transactions begun and concluded therein. * * *
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> The principle approved in these cases applies here. A State cannot legislate effectively concerning matters beyond her jurisdiction, and within territory subject only to control by the United States.

The same Court's language in *Collins* v. *Yosemite Park Company,* 304 U.S. 518, 530 (1938), is also squarely in point:

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nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new sovereign" (*Chicago, Rock Island & Pacific Ry.* v. *McGlinn,* 114 U.S. 542, 546 (1885); Report of the Interdepartmental Committee, Part II, *supra,* footnote 18, at p. 156 et *seq.*), this "international law rule" does not apply with respect to State laws which require administrative action on the part of State officials. (Report of the Interdepartmental Committee, Part II, *supra,* footnote 18, at pp. 161, 162.) The reservation of the right to serve process within the ceded area would not permit enforcement by the State within the enclave of her laws requiring action of administrative officials, even had such a law respecting use of the waters in question been in effect when the cession act became effective (*Id.,* pp. 118 *et seq.*). Even pre-existing laws continuing in effect within a ceded area under the international law rule are effective only as laws of, and to be enforced by, the sovereignty to which jurisdiction is ceded (*Id.,* pp. 157, 158, 162).

> * * * [J]urisdiction less than exclusive may be granted the United States. The jurisdiction over the Yosemite National Park is exclusively in the United States except as reserved to California, e.g., right to tax, by the Act of April 15, 1919. As there is no reservation of the right to control the sale or use of alcoholic beverages, such regulatory provisions as are found in the act under consideration are unenforceable in the Park.

There can be no question regarding the manner by which jurisdiction was transferred in this instance. In *Surplus Trading Co.* v. *Cook,* 281 U.S. 647, 651-652 (1930), the Court said:

> As respects such a military reservation—that is, one which is neither excepted from the jurisdiction of the State at the time of her admission nor established upon lands purchased therefor with the consent of her legislature,—the State undoubtedly may cede her jurisdiction to the United States and may make the cession either absolute or qualified as to her may appear desirable, provided the qualification is consistent with the purposes for which the reservation is maintained and is accepted by the United States. *And where such a cession is made and accepted it will be determinative of the jurisdiction of both the United States and the State within the reservation.* [Emphasis supplied.]

Simply that the subject of regulation within the enclave is the use of water does not call for or permit disregard of Nevada's cession act. In *Santa Margarita Mutual Water Company* v. *United States,* 235 F. 2d 647, 656 (1956), this Court recently declared:

> Now it must be conceded by all parties that the United States had sovereign rights in the enclave. The rules governing the use of that property were properly set by the Executive under the Constitution. Its rights within the borders were sovereign, paramount and supreme. This principle applied to the use of water appurtenant to the land. The United States could store the water which came to the land or use it on a different watershed than that of the Santa Margarita without interference from anyone. *The Water Master of the State of California had no authority in the enclave and could not object.* Santa Margarita could not object or prevent the United States from using the water which came onto the land in any way its officers chose. This sovereign authority was essential and was granted by the Constitution. [Emphasis supplied.]

In other words, regardless of who owns the water which occurs under the ground of this Federal enclave, the regulation of its use is beyond the reach of the State of Nevada simply because that State has transferred to the United States any and all power, except as expressly reserved, which she may have had to legislate and enforce her legislation with respect to activity of any kind within the area.

Clearly, there is nothing in § 666, 43 U.S.C., to permit a different conclusion. *Infra,* at pp. 80-85, we treat in somewhat more detail Nevada's contentions with respect to the substantive effect of that statute. In connection with this point of our argument, we note simply that there is nothing in the words of the statute or in its legislative history from which there can be derived

even the faintest glimmer of a Congressional purpose to retrocede to the States all areas over which the United States had previously acquired exclusive jurisdiction.

III

A State May Not Control or Veto Constitutional Activities of the United States. Section 666, 43 U.S.C., Does Not, and Indeed Could Not, Change This.

It is appropriate at this point to recall certain of the stipulated facts and to emphasize their significance. The wells in question were and are required in order to provide a water supply for beneficial uses necessary to the accomplishment of the purposes of the Hawthorne Naval Ammunition Depot (R. 52). The Depot was established for purposes of the national defense (R. 44). It has been at all times and now is operated and maintained by the Department of the Navy as a major installation in the program of that Department for the defense of the Nation (R. 45).

In addition, we again emphasize that the validity of none of the Federal laws under which the reservation has been established and is operated has been challenged. There is no charge of action in excess of statutory authority by the officers of the executive branch of the Federal Government charged with administration of the activity. No federal statute has been cited which even authorizes, let alone directs, the officers of the United States administering the Depot to use the waters in question only as permitted by the State of Nevada or its administrative officers. *Supra,* p. 15.

In view of the foregoing, we submit, Article VI, Clause 2, of the Constitution of the United States com-

pletely dissipates the Nevada claim of authority to control the use by the United States of the waters needed to perform its constitutional functions on this reservation. This conclusion appears to be as clear as the answer to any question that this provision of the Constitution was designed to resolve.

The verity of this proposition saw early articulation by the Supreme Court of the United States. In *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316, 424 (1819), Mr. Chief Justice Marshall explained:

> * * * No trace is to be found in the constitution, of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. * * *

The District Court, correctly, we submit, deemed *McCulloch* of controlling significance. In its opinion, that Court concluded its references to the cogent language of the early decision (R. 70, 165 F. Supp. at 606) with this quotation:

> The Court has bestowed on this subject its most deliberate consideration. The result is that the States have no power, by taxation *or otherwise,* to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared. [Emphasis supplied.] [*Id.,* at 436.]

The decision in *McCulloch,* as it was more recently explained by Mr. Justice Holmes in *Johnson* v. *Maryland,* 254 U.S. 51, at 55-56 (1920), "was not put upon any consideration of degree *but upon the entire absence of power on the part of the States* to touch, in that way at least, the instrumentalities of the United States, 4 Wheat. 429, 430, *and that is the law today.*" [Emphasis supplied.]

Moreover, Mr. Justice Holmes concluded his opinion in *Johnson* v. *Maryland* with observations that we feel are conclusively apposite to the facts and legal posture of this case. He said:

> It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed. *Keim v. United States,* 177 U.S. 290, 293. [254 U.S. at 57.]

We submit there is no logical difference between a situation where a state seeks to exact a license requirement from a federal employee driving a mail truck, as in *Johnson* v. *Maryland,* and the instant situation where the state seeks to exact a permit requirement

from federal representatives managing a defense installation.

The principles spelled out in *McCulloch* and echoed in *Johnson* are applicable to the national defense function of the United States. Const., Art I, § 8, Cl. 1; and see Art. 1, § 8, Cl. 14. This has been demonstrated very recently in *Public Utilities Commission of California* v. *United States,* 355 U.S. 534 (1958), affirming 141 F. Supp. 168 (D.C. Cal. 1956). There it was held that rates negotiated by the United States with commercial carriers for its military transportation needs were not subject to approval as required by state law.

In *Leslie Miller Inc.* v. *Arkansas,* 352 U.S. 187 (1956), the Court held that state standards regulating contractors were inapplicable to defense contracts of the United States. In so doing, the Court cited and applied the rationale of *Johnson,* quoted *supra.*

Turning to the specific field of water, we again invite attention to *Arizona* v. *California,* 283 U.S. 423 (1931). There the State of Arizona sought authority over plans and specifications for what is now Hoover Dam. Arizona contended that approval of the state engineer as prescribed by Arizona laws was a necessary prerequisite to construction of the dam by the Secretary of the Interior. The Supreme Court disposed of this by noting, on pp. 451-452:

> * * * If Congress had the power to authorize the construction of the dam and reservoir under its power over navigation, [the Secretary] is under no obligation to submit the plans and specifications to the state engineer for approval. * * *

In the instant situation, Nevada has conceded that the extraction of the waters in question is needed to

accomplish the purposes of the Depot, the operation of which is an exercise of the defense power. And she noted in her opening brief on appeal, at pp. 47-48:

> The Lower Court in its opinion and conclusions of law, stressed the National Defense Powers of the United States as the compelling reason for the dismissal of the action. The appellant has no quarrel with such powers, nor the grounds upon which they are premised. * * *

Inasmuch as the withdrawal of the waters is admitted to be in the exercise of the national defense power, the United States, in the language of *Arizona* v. *California, supra,* "is under no obligation to submit the plans and specifications to the state engineer for approval." And what was said in *Arizona* v. *California* is all the more significant, we suggest, because that case and this are parallel insofar as both dealt with the status of asserted state control over water *vis-a-vis* a federal power.

We pause here to dispose of what Nevada has said with regard to the exercise by the United States of the defense power. She evidently seeks to salvage her untenable position by asserting on page 48 of her opening brief that "the record here fails to disclose any substantial basis upon which it is or can be claimed such powers were or would be endangered by reason of the State laws in question." We answer in the words of Chief Justice Marshall in *McCulloch,* 17 U.S. at p. 431:

> * * * But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know

> they would not. Why, then, should we suppose that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it is as it really is. [*Id.,* at 431.]

And we repeat here the language of Mr. Justice Holmes, quoted *supra,* p. 51, in his explanation in *Johnson* v. *Maryland* of the *McCulloch* holding: "*The decision* * * * *was* not *put* upon any consideration of degree but *upon the entire absence of power* on the part of the States to touch, in that way at least, the instrumentalities of the United States * * *." [Emphasis supplied.]

We doubt that Nevada intimates, by the language quoted from her opening brief, that the use of water on a naval installation is not activity falling within the exercise of the defense power. If she does, however, we meet it with the observation of the Supreme Court that the Tenth Amendment, providing for the reserved rights of the states, does not deprive "the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." *United States* v. *Darby,* 312 U.S. 100, at 124 (1941). And see *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, at 330-331 (1936).

Even were it assumed, *arguendo,* that the exercise of the defense responsibility in this case somehow interferes with state water policy, such interference would be wholly immaterial. For about such a possibility, the Supreme Court in *Oklahoma* v. *Atkinson Co.,* 313 U.S. 508, 534-535 (1941), said:

> * * * [T]he suggestion that this project interferes with the state's own program for water development and conservation is likewise of no avail. That program must bow before the "superior power" of Congress.

It is to be observed that the United States is here performing its constitutional functions directly, by its own officers and employees.[20] The authorities we have cited settle beyond dispute that in such cases, the United States is insulated from the application of state police regulations.[21] The District Court's decision in this respect was clearly correct.

Appellant's claim of authority to control the United States' activities in the operation of the Depot is insupportable even without ultimate regard to Article VI

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[20] We emphasize this point because we recognize that nondiscriminatory state taxes on activities of contractors, for instance, doing business for the United States have been sustained. Such taxes, at most, increase the costs of operation. *E.g., James* v. *Dravo Contracting Co.,* 302 U.S. 134 (1937). Here, of course, the state is attempting to impose control on the national government. This cannot be done. See *Public Utilities Commission of California* v. *United States,* 355 U.S. 534, at 543-544 (1958).

[21] Another case particularly apposite is *Ohio* v. *Thomas,* 173 U.S. 276 (1899). In reversing the conviction of the governor of a national soldiers' home for serving oleomargarine contrary to state law, the court said that the federal officer was not "subject to the jurisdiction of the State in regard to those very matters of administration which are thus approved by Federal authority." 173 U.S. at 283.

of the Constitution. For the Constitution has granted to the Union of the States the power to "provide for the common Defence." Const., Art 1, § 8, Cl. 1; and see Art. 1, § 8, Cl. 14. This provision necessarily divests appellant's claim of any support, either in law or logic. This is so even without consideration of ownership of the right to use the waters in issue here, and even without regard to the cession of jurisdiction by Nevada to the United States.

For if appellant could grant or withhold a permit to use the waters within the enclave essential to accomplishment of the purposes thereof, she could in effect exercise a power of veto over the constitutional functions of the United States. But such a power cannot exist in a state. In any area where the United States has undertaken to exercise its constitutional authority, there is "no room or need for conflicting state controls." *First Iowa Coop.* v. *Federal Power Commission,* 328 U.S. 152, 181 (1946). For a State to exercise such a veto power "would result in the very duplication of regulatory control precluded by the *First Iowa* decision." *Federal Power Commission* v. *Oregon,* 349 U.S. 435, 445 (1955).

We again note that we do not contend that the United States could invade with impunity vested rights of others to use the waters in question. But see footnote 1, *supra,* and page 19, *supra.* If there were an impairment of such rights, the United States would be required to compensate. See *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275, 291 (1958). But we do contend that the State is without power to declare that the United States may use these waters only upon compliance with a procedure established by the Nevada legislature. *Id.,* at 295.

Regarding § 666, we note only that there is nothing in either the language of the statute or in its legislative history to suggest that by its enactment Congress intended to attempt to require that in all or any of its water-using activities the United States should utilize water only if permitted to do so by the laws of whatever State or States might be concerned. Any other conclusion, as we point out *supra,* pp. 41-43, would raise serious doubts as to the constitutionality of the statute.

IV

The United States Owns the Right to Use the Waters Underlying the Hawthorne Naval Ammunition Depot. The Use of Such Waters Is Not Subject to Control by the State of Nevada. There Is Nothing in Section 666, 43 U.S.C., Which Permits a Different Conclusion.

A. *Such waters are percolating waters and as such are part and parcel of the soil.*

Appellant seeks a declaration that the underground waters within the Hawthorne Naval Ammunition Depot are the property of the State and that their use without a permit from the State is therefore illegal (R. 18-19). She intimates that she acquired such ownership upon admission to the Union and, if not by that means, upon passage by Congress of the Desert Land Act of 1877.

But appellant has not established ownership of the waters in question. On the contrary, she has conceded that title to the lands within the reservation has been in the United States at all times since 1848 when the same were ceded to the United States of America by the United Mexican States (R. 45-46). She has stipulated that the waters tapped and developed by the wells

in question are percolating waters (R. 52). She has stipulated that the area wherein such wells are situated has not been designated by the state engineer as a basin or sub-basin, and she has stipulated that the development and operation of said wells does not interfere, and has at no time interfered, with any vested right of any person (R. 52). Her Supreme Court has held that percolating waters are part of and cannot be distinguished from the soil itself. "* * * [S]uch water is not, and cannot be, distinguished from the estate itself, and of that the proprietor has the free and absolute use * * *." *Mosier* v. *Caldwell,* 7 Nev. 363, 367 (1872). And see *Strait* v. *Brown,* 16 Nev. 317, 323 (1881).

Thus, it is to be seen that the percolating waters within the Depot are as much a part of the land as the soil itself. This has been declared to be the law by the Supreme Court of Nevada. It is the law generally.[22] Under that rule of law, title to such waters stayed in the United States as owner of the land when Nevada was admitted into the Union in 1864 and disclaimed "all right and title" to the lands here involved as well as to all other unappropriated public lands within the territory (R. 46-50).

Under that same rule of law, title to those waters stays in the United States today. For regardless of all other considerations, Nevada could no more take from the United States the ownership of the percolating waters comprising an inseparable part of the estates

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[22] In Kinney on Irrigation and Water Rights, Vol. 2, p. 2157, § 1190, the rule is stated in these words: "Diffused percolations being but a component part of the earth, or ground, where they are found, it follows that they are not subject to ownership separate and distinct from the soil itself."

than she could appropriate to ownership by the State the soil itself.[23]

On this question, the Supreme Court of California, discussing language in the California Water Code which states, "* * * all water within the State is the property of the people of the State," has expressed itself this way:

> Taken literally, this would include all water in the state privately owned and that pertaining to the lands of the United States, as well as that owned by the state. It should not require discussion or authority to demonstrate that the state cannot in this manner take private property for public use * * *. The constitution expressly forbids it. (Art. I, Sec. 14). The water that pertained to or was contained in the lands of the state was already the property of the people when this [statute] was adopted. *The statute was without effect on any other property.* [Emphasis supplied.]

San Bernardino v. *Riverside,* 186 Cal. 7, 29-30, 198 Pac. 784 (1921).

Moreover—although were the circumstances otherwise the controlling significance of the foregoing considerations would not be lessened—not until after all of the lands in question had been withdrawn and re-

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[23] Under the following subheading, at pp. 76-77, we urge that the Desert Land Act of 1877 and its forerunners were not intended to apply with respect to percolating ground waters. Waters which, by their very nature, in the language of the Nevada Supreme Court, "cannot be distinguished from the estate itself" and which in the words of a respected authority on western water law "are not subject to ownership separate and distinct from the soil itself," supra, footnote 22, would seem to be incapable of severance from the land in which they occur.

served for the purposes of national defense and not until after Nevada had ceded legislative jurisdiction over the lands in question did the Nevada legislature even assert authority to control the use of percolating waters. For by Section 84 of Chapter 140, Nevada Statutes 1913, § 7970, Nevada Compiled Laws, 1929, Appendix B, p. 95, it was provided that vested rights were not impaired by that act. And by Section 1 of "An Act * * * defining the underground waters which are governed by the laws relating to the appropriation of the public waters of the state * * *," approved March 24, 1915, § 7987, Nevada Compiled Laws, 1929, Appendix B, p. 95, percolating water was expressly excluded from the declaration that all underground water was subject to appropriation under the laws of the State. This express exclusion of percolating waters continued in effect until the then existing underground water law was repealed by the Act approved March 25, 1939, Nevada Statutes, 1939, page 274. And the assumption of control by the terms of the latter Act over all underground waters within the boundaries of the State was "subject to all existing rights."

Inasmuch as the waters in question are part and parcel of the land itself, and are owned by the United States and not by the State of Nevada, it is clear beyond question that their use by the United States as owner of the land is not subject to regulation or control by the State of Nevada. Const., Art. IV, § 3, Cl. 2. This constitutional truism was echoed very recently by the Supreme Court in *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275 (1958). There, the Court held that the United States could say on what conditions its water rights might be used by reclamation project

contractees, even though such terms were in conflict with state law on the matter. Pertinent here is this language from pages 294-295 of the Court's opinion:

> * * * In developing these projects the United States is expending federal funds and acquiring federal property for a valid public and national purpose, the promotion of agriculture. This power flows not only from the General Welfare Clause of Art. I, Section 8, of the Constitution, but also from Art. IV, Section 3, relating to the management and disposal of federal property. As this Court said in *United States* v. *San Francisco,* 310 U.S. 16, 29-30 (1940), this "power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.' " [Cases cited.]
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> Also beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges. [Cases cited.] The lesson of these cases is that the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the overall objectives thereof. Conversely, *a State cannot compel use of federal property on terms other than those prescribed or authorized by Congress. Public Utilities Comm'n of California* v. *United States,* 355 U.S. 534 (1958). [Emphasis supplied.]

B. *Without regard to the classification of these underground waters as percolating waters, and without regard to the legal implications of such classification, the rights to the use thereof appurtenant to the reserved lands of the United States are not subject to appropriation under the laws of Nevada or otherwise to control by the State.*

1. *Ownership of the right to use such waters was originally acquired by the United States in 1848 under the Treaty of Guadalupe Hidalgo.*

Reference has been made at p. 57, *supra,* to the stipulated fact that at all times since 1848 title to the lands within the reservation has been in the United States. We think it is hardly disputable that when the United States acquired title to the lands it acquired title to all appurtenant rights, including the right to use the underground waters pertaining thereto.

Therefore, unless there has been a grant from the United States to the State of Nevada of the appurtenant rights to the use of water—without regard to the character of those waters—Nevada has obviously failed to establish her claim of ownership of the waters in question and the ownership thereof, or of the right to use the same, must be held to continue in the United States. For in *Utah Light & Power Co.* v. *United States,* 243 U.S. 389, at 404 (1917), the Supreme Court has explained that:

> * * * Not only does the Constitution (Art. IV, § 3, cl. 2) commit to Congress the power "to dispose of and make all needful rules and regulations respecting" the lands of the United States, but the settled course of legislation, congressional and

> state, and repeated decisions of this court have gone upon the theory that the power of Congress *is exclusive* and that only through its exercise in some form can rights in lands belonging to the United States be acquired. * * * [Emphasis supplied.] [24]

Accordingly, use by the United States of the waters under the ground of its reserved lands cannot constitute an invasion of or interference with state sovereignty. The extraction of the waters by the United States is merely an exercise of its "complete power" over its property. See *United States* v. *San Francisco,* 310 U.S. 16, at 30 (1940).

2. *Title to such waters or to the right to use them did not pass to Nevada on that State's admission into the Union.*

It has been at least implied by appellant that upon admission of the State into the Union, title to the waters upon and beneath the public lands by some means shifted from the United States to the State. Appellant evidently cites the "equal footing" clause of the enabling act to support such theory. Appel-

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[24] It is equally clear that, in the absence of federal legislation authorizing State action, such Government-owned property is immune from regulation or control by the State; properly authorized federal agencies may use and regulate the land, as well as its waters and resources, without regard to State regulatory laws. E.g., *Camfield* v. *United States,* 167 U.S. 518, 526 (1897); *Light* v. *United States,* 220 U.S. 523 (1911); *Hunt* v. *United States,* 278 U.S. 96, 100 (1928); *Arizona* v. *California, supra,* p. 19; *United States* v. *Rio Grande Irrigation Co., infra,* p. 70; *Gibson* v. *Chouteau,* 80 U.S. (13 Wall.) 92 (1871); *United States* v. *Oregon,* 295 U.S. 1, 27-29 (1935). If that were not the rule, the properties of the United States would be "completely at the mercy of state legislation." *Camfield* v. *United States, supra.* And see *supra,* pp. 49-57.

lant's Opening Brief, pp. 28-29; Stipulation of Facts, Paragraph V, R. 46, 48, 49.

Clearly refuting such theory is the fact that by her enabling act the people of Nevada were required, as a condition of admission, to "agree, and declare, that they forever disclaim all right and title to the unappropriated lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States; * * *." By her Constitution, the people of the State complied explicitly with that condition (R. 49). This disclaimer, of course, applied to the waters pertaining to the soil as well as to the soil itself.[25]

It is also to be noted that the "equal footing" clause refers to political rights and sovereignty, as distinguished from economic parity or proprietary rights. In *United States* v. *Texas,* 339 U.S. 707, at 716 (1950), it was explained:

> The equal footing clause has long been held to refer to political rights and to sovereignty. See *Stearns* v. *State of Minnesota,* 179 U.S. 223, 245. It does not, of course, include economic stature or

[25] There is no distinction in this connection between percolating waters and other appurtenant waters, whether above or below ground. Kinney, in his work on Irrigation and Water Rights, Vol. 2, 2d Ed., Sec. 638, p. 1118, in discussing provisions such as this in enabling legislation, has stated: "In these provisions the waters flowing within the boundaries of the State must be included as a part and parcel of the public lands." In *Hough* v. *Porter,* 51 Ore. 318, 382, 389, 391, 98 Pac. 1083 (1909), the Supreme Court of Oregon recognized that the United States, as owner of the public domain, had the right and power to provide for disposition of the waters thereon by act of Congress. The disclaimer in the Oregon Admission Act, Act of February 4, 1859, 11 Stat. 383, 384, was in these words: "* * * said State shall never interfere with the primary disposal of the *soil* within the same by the United States, * * *." [Emphasis supplied.]

> standing. There has never been equality among the States in that sense. Some states when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil. * * *

In addition, the cases discussed in the immediately following materials in connection with the Desert Land Act show beyond question the complete fallacy of Nevada's argument about the "equal footing" clause.

3. *The Desert Land Act of 1877 applies only with respect to "public lands." It does not make waters on the reserved lands of the United States subject to appropriation in accordance with local law.*

The Desert Land Act of 1877 (19 Stat. 377; 43 U.S.C. § 321) and its predecessors, Section 9 of the Act of July 26, 1866 (14 Stat. 251, 253; 30 U.S.C. § 51) and Section 7 of the Act of July 9, 1870 (16 Stat. 217, 218, 43 U.S.C. § 661), Appendix B, pp. 91-93, appear to be sources of primary reliance for Nevada in support of her claim of title and authority. But even the most cursory examination of the language of those enactments discloses that they apply only to the *public lands.* They do not apply to the reserved lands of the United States. It is well established that by the withdrawal of lands from the public domain the unappropriated waters appurtenant to the lands so withdrawn are set aside and reserved for the purposes of the reservation, and are thereby removed from the operation of the acts of 1866, 1870 and 1877 permitting appropriation and beneficial use by the public of waters on the public lands.

If there could ever have been any doubt about this, it is conclusively settled by the recent decision of the Supreme Court in *Federal Power Commission* v. *Oregon,* 349 U.S. 435 (1955). In that case Oregon contended that the project there involved would interfere with that State's fish and game regulations, and that the acts of 1877, 1870 and 1866 constituted an express Congressional delegation or conveyance of power to the State to regulate the use of the waters in question.

The Supreme Court rejected the Oregon argument and upheld the Federal Power Commission's authority to license the project. It concluded, *inter alia,* that there was no constitutional question as to the Commission's authority to license a project on reserved lands of the United States. This authority, the Court noted, springs from the Property Clause of the Constitution, Art. IV, § 3, Cl. 2, which provides: "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

It was determined that it was not necessary to consider whether the acts of 1877, 1870 and 1866 constituted the express delegation or conveyance of power claimed by the State. This was because, the Court explained, those acts are "not applicable to the reserved lands and waters here involved." 349 U.S. at 448. The Court went on to say:

> * * * The Desert Land Act covers "sources of water supply upon the public lands . . . ." The lands before us in this case are not "public lands" but "reservations." Even without that express restriction of the Desert Land Act to sources of water supply on public lands, these Acts would not

apply to reserved lands. *"It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose." United States* v. *O'Donnell,* 303 U.S. 501, 510. See also, *United States* v. *Minnesota,* 270 U.S. 181, 206. The instant lands certainly "are not unqualifiedly subject to sale and disposition. . . ." [Emphasis supplied.]

In light of the Supreme Court's unequivocal differentiation in that case between public and reserved lands, it is patent that the Desert Land Act and cognate statutes have absolutely no application to the federal military reservation here involved. For the lands within the enclave certainly "are not unqualifiedly subject to sale and disposition."

It should be noted, moreover, that there was nothing new in the Supreme Court's determination of that case. In *United States* v. *McIntire,* 101 F. 2d 650, at 653, 654 (1939), this Court had said, with reference to the contention that the Act of 1866 authorized the appropriation of rights to the use of water within an Indian reservation pursuant to the laws of Montana: "That statute, however, applies only to 'public lands'." This conclusion was simply a reaffirmation of the Court's earlier decision in *Winters* v. *United States,* 143 Fed. 740, at 747 (C.A. 9, 1906), *affirmed* 207 U.S. 564 (1903). And see *infra,* pp. 69-71.

4. *Even as to unappropriated waters on the "public lands" the Desert Land Act does not transfer ownership to the States.*

Even were it not true that the Desert Land Act and the earlier statutes do not apply to lands reserved for Federal purposes, it is nevertheless emphatically clear that none of them transferred to the States title to the unappropriated waters on the public lands. Speaking of Section 9 of the 1866 statute, the Supreme Court has said:

> The object of the section was to give the sanction of the United States, *the proprietor of the lands,* to *possessory* rights, which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the lands. * * * The act * * * continued the system of free mining, holding the mineral lands open to exploration and occupation, subject to legislation by Congress and to local rules. It merely recognized the obligation of the government to respect *private rights which had grown up under its tacit consent and approval.* It proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were attached. Cong. Globe, 1st Sess., 39th Cong., Part IV, pp. 3225-3228. [Emphasis supplied.]

Jennison v. *Kirk,* 98 U.S. 453, 456-7, 459 (1878).

The Desert Land Act is no more capable of being construed as a grant of title to the unappropriated waters to the States. By the proviso in that Act (43 U.S.C. § 321), Congress simply provided that "the waters of all lakes, rivers and other sources of water

supply upon the *public lands* and not navigable, shall remain and be held free for the appropriation and use *of the public* * * *." (Emphasis supplied.) This is not language of conveyance of title to the states—or of irrevocable surrender or abandonment of title in the United States to waters not appropriated in accordance with the authorization.[26] Its effect is nothing more than that stated in the court's paraphrase in *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935): "The fair construction of the provision * * * is that Congress intended to establish the rule * * * that all non-navigable waters [on the land] *should be reserved for the use of the public* under the laws of the states and territories named * * *" (Emphasis supplied.) Authorization of the acquisition by individuals of rights to the use of water upon the lands of the United States by following procedures established by local law for the acquisition of water rights is not, of course, a conveyance of title to the States. The United States, continuing to own the public lands and the unappropriated waters pertaining thereto, has the power to withdraw such lands and the appurtenant unappropriated waters for Federal purposes.

A long time ago, the Supreme Court of the United States, recognizing the power of the States to prescribe within their boundaries rules for the use of those

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[26] *E.g.*, see 43 U.S.C. § 982, where Congress by express and clear language granted swamp and overflowed lands to the states. It is a well-settled maxim of public land law that grants from the United States are strictly construed against the grantee. Nothing passes except what is conveyed in clear language. Doubts are resolved in favor of the United States. See, *e.g.*, *United States* v. *Union Pacific R. Co.*, 353 U.S. 112, 116 (1956); *United States* v. *Wyoming*, 331 U.S. 400 (1947).

waters that are under their jurisdiction, made this declaration: "Although this power of changing the common law rule as to streams within its domain undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the Government property." *United States* v. *Rio Grande Irrigation Co.,* 174 U.S. 690, 703 (1899). The Court rejected the contention there made that the diversion in question was authorized by the Act of 1866 and the Desert Land Act. Referring to a later statute prohibiting obstructions to navigation without the consent of Congress (Act of September 19, 1890, 26 Stat. 454 § 10), the Court said at page 707: "As this is a later declaration of Congress, so far as it modifies any privileges or rights conferred by prior statutes it must be held controlling, at least as to any rights attempted to be created since its passage; and all the proceedings of the appellees in this case were subsequent to this act."

In *Winters* v. *United States,* 207 U.S. 564 (1908), the United States sued to restrain Winters and others from obstructing the flow of a non-navigable stream to an Indian reservation. The reservation had been established in 1888, subsequent to the Acts of 1866, 1870 and the Desert Land Act. Nonetheless, citing the *Rio Grande* case, *supra,* the Court held against Winters, saying, at page 577, "* * * The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be."

The conclusions reached in these cases, as well as in *Federal Power Commission* v. *Oregon, supra,* p. 66,[27] would not have been possible if the Desert Land Act or either of the earlier acts had conveyed title to, or irrevocably surrendered control of, the unappropriated, non-navigable waters on the public lands to the states. Such a transfer would have constituted a *fait accompli.* Subsequent United States action, either in direct legislation or by way of reservation, would have been ineffectual. The Government, obviously, could not have reserved or withdrawn something it no longer had.

Appellant relies heavily on *California Oregon Power Company* v. *Beaver Portland Cement Company,* 295 U.S. 142 (1935). That decision does not support her contentions. Instead, it fully supports the position asserted here by the United States.

The first thing to note about that case is that it pertained to "public lands," not reserved lands of the character here involved. The Court was speaking of "public lands" when it said: "* * * The fair construction of * * * [the Desert Land Act of 1877] is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use *of the public* under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not navigable 'shall remain and be held free for the appropriation and use of the public' are not susceptible of any other construction." (Emphasis supplied.) 295 U.S. 162. Nothing in this statement reveals any basis to conclude that the United States has relinquished all

[27] And see *United States* v. *Conrad Investment Company,* 161 Fed. 629 (C.A. 9, 1908).

rights in non-navigable waters upon or beneath the surface of its *reserved* land. On the contrary, the Court, in describing the policy that Congress had in mind as being "to further the disposition and settlement of the public domain," (295 U.S. 161), makes clear the limitation of the acts of Congress to *public lands* open to private entry and for which patents could be issued.

But even as to "public lands," the Court did not announce that the United States had ceded full title or control of the waters to the States. Rather, the decision declared that subsequent to the Desert Land Act the public lands would be patented separately from waters on those lands. Title to the lands and to the rights to the use of water remained in the United States until there had been fulfillment of the conditions imposed by Congress for their acquisition. Kinney on Irrigation and Water Rights, Vol. 1, 2d Ed., Sec. 411, pp. 692-3.

Whatever question might otherwise exist as to the somewhat ambiguous language of isolated sentences of the opinion in that case, the Supreme Court itself has made clear its meaning when it said in *Federal Power Commission* v. *Oregon, supra,* p. 66, 349 U.S. at 447-448:

> The purpose of the Acts of 1866 and 1870 was governmental recognition and sanction of *possessory rights* on public lands asserted under local laws and customs. *Jennison* v. *Kirk,* 98 U.S. 453. The Desert Land Act severed, *for purposes of private acquisition,* soil and water rights on public lands, and provided that *such water rights* were to be acquired in the manner provided by the law of the State of location. *California Oregon Power Co.*

v. *Beaver Portland Cement Co.,* 295 U. S. 142. See also, *Nebraska* v. *Wyoming,* 325 U.S. 589, 611-616. [Emphasis supplied.]

It is true that in *Power Co.* v. *Cement Co.* the Court said that after 1877 "all nonnavigable waters then a part of the public domain became *publici juris,* subject to the plenary control of the designated states, * * * with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain." 295 U.S. at 163-164. Nothing in this statement militates against the foregoing summarization of the holding. "Plenary control" by the States of the manner in which the *public* could acquire *from the United States rights* to the use of water upon public land is not a recognition of any transfer of the title to those rights to the States. Neither does the Court's language mean that Congress has invested the States with "plenary control" over the use by the United States of its own properties in the performance of its constitutional functions.

So interpreted, the 1877 Act has a direct parallel in the mining laws which stem from the same precursor Acts of 1866 and 1870.[28] State and local mining laws were adopted by Congress as subsidiary regulations to govern the disposition of government mineral property to locators. See *Butte City Water Co.* v. *Baker,* 196 U.S. 119 (1905). The Court there recognized that the United States retained title to the minerals not privately acquired under the statutes and that Congress

[28] Section 1 of the 1866 Act even contained a mineral counterpart to the general "public use" provision of the 1877 Act as to water: "That the mineral lands of the public domain * * * are hereby declared to be free and open to exploration and occupation by all citizens of the United States * * *."

retained its full measure of constitutional control over their disposition. Similarly, in the case of unappropriated rights to the use of water, under the Desert Land Act the United States retains its full measure of constitutional control over the disposition of them.

Ickes v. *Fox,* 300 U.S. 82 (1937), cited on pp. 21 and 33 of appellant's opening brief, has nothing to do with the problem here. It will be observed the Court did nothing but describe briefly the holding in *Beaver Portland.* And that we have explained above. The question before the Court was whether in that suit against the Secretary of the Interior the United States was an indispensable party. The relief sought was an injunction against requiring plaintiffs, landowners within an established reclamation project, to pay a part of the cost of additional storage which was being constructed for the service of new lands and was not necessary to serve the lands of the original project as a condition to receiving the full quantity of water necessary for irrigation of their lands. Plaintiffs alleged that they owned paid up rights under the project to such quantity of water and that those rights were appurtenant to their lands. This allegation of title in plaintiffs was not controverted. The case went up by special appeal from an order denying the Secretary's motion to dismiss. The Court noted, 300 U.S. 96, that the motion to dismiss conceded the truth of plaintiff's allegation of title. There was no consideration of the ownership of rights to use the unappropriated waters on reserved lands or on public lands. There was not even a disputed question of ownership of rights to use the project waters as between the United States and the project landowners. Had there been, we assume the case would have been decided with reference to § 8 of the Reclama-

tion Act of 1902 and other provisions of reclamation law which would have been applicable. But the questions before this Court in this case would not have been settled.[29]

There can be no other rational interpretation of the Desert Land Act than the one for which we contend. It would be to accuse Congress of emasculating its own legislation to say that by the Desert Land Act control or ownership of the non-navigable waters on the public lands was irrevocably surrendered to the states. This is because such action by Congress would mean that it had split off a segment of its property that was *indispensable* to the implementation of its land disposition policy. One property interest was necessary to the vesting of rights in the other, under the requirements of the Desert Land Act.

It must be remembered, of course, that the Desert Land Act was an arid-land adaptation of Congress' land disposition and settlement policy.[30] The act was devised as a way by which title to *both* land and the use of water could be acquired so that the lands in the designated desert land states could be settled—just as other areas were and have been settled under the homestead and pre-emption laws. The act authorized the disposal of *lands,* conditioned upon reclamation by ir-

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[29] It should be noted that *Larson* v. *Domestic & Foreign Corp.,* 337 U.S. 682 (1949), casts considerable doubt on the holding in *Ickes* v. *Fox* that the suit there was not in effect against the United States. However, this doubt relates to whether the tortious character of an officer's conduct is sufficient to make that conduct unlawful so that a suit to restrain such conduct is not in effect a suit against the United States. It has nothing to do with the ownership or control of the unappropriated waters on the reserved and public lands of the United States.

[30] See *California Oregon Power Co.* v. *Beaver Portland Cement Co., supra,* 295 U.S. at 157, 161.

rigation. Water was only incidental, albeit necessary, to the disposal of the public lands involved. The primary purpose, then, was to facilitate the disposal and settlement by the public of the public *lands* in the desert land states, not disposal of the waters of and by themselves.

If Congress had transferred ownership or irrevocably surrendered control of the unappropriated nonnavigable waters to the states, it would mean that the United States' public land policy in the desert land states would exist entirely at the mercy of the states. A State, for example, might decide that it would use all of the waters within its borders for industrial uses, rather than land reclamation and settlement purposes. And the main purpose of the Desert Land Act would be thereby completely frustrated.

To thus risk the creation of a vast desert-like "white elephant," we strenuously maintain, is exactly the opposite of what Congress intended by the Desert Land Act.

Moreover, we submit that Congress did not intend the Desert Land Act to apply to percolating waters. This would seem to be true merely from consideration of the fact that such waters are generally held to be inseparable from the soil itself. *Supra,* pp. 57-61. Further, so far as we have determined, such waters were not subject to appropriation under the laws of any of the States in 1877. (Nevada, as before noted, expressly excluded them from her appropriation laws until 1939.) And the express language of the act refers only to "lakes, rivers, and other sources of water supply *upon* the public lands *and not navigable.*" In discussions in the pertinent legislative history indicat-

ing the nature of the water sources under consideration, only surface waters were referred to. (Congressional Record, 44th Cong., 2d Sess., pp. 1966, 1967, 1968.) The words "and not navigable," we suggest further, have significance in their attempted distinction and limitation only with regard to surface waters.

But even should the Court be persuaded to the view that the act does apply to such underground waters it is plain that Congress has not regarded the act an irrevocable transfer of title or surrender of the power to control such water to the States. For by the Act of October 22, 1919 (41 Stat. 293, 43 U.S.C. §§ 341-360), Congress provided a system for the exploration for and development of underground waters "beneath the surface" of the public lands within the State of Nevada under permit granted by the Secretary of the Interior. That act is still in full force. Beyond any question, it places in the Secretary of the Interior full and complete jurisdiction with respect to the development and use of the underground waters beneath the surface of the "unreserved * * * public lands of the United States within the State of Nevada * * *."[31]

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[31] And see Sec. 10 of the Act of December 29, 1916 (39 Stat. 865, 43 U.S.C. 600) as evidence that Congress has not considered that it has transferred to the States the ownership of unappropriated waters on or under United States' lands. That section authorized reserving areas containing springs or water holes. See also Act of June 4, 1897, c. 2, 30 Stat. 36, 16 U.S.C. 481; Act of June 11, 1906, c. 3074, sec. 3, 34 Stat. 234, 16 U.S.C. 508; Act of June 25, 1910, c. 421, 36 Stat. 847, 43 U.S.C. 141, 142; and the Federal Power Act of June 10, 1920, 41 Stat. 1063. These statutes, enacted after 1877, exercise control over nonnavigable waters on the public domain.

5. *There having been no grant by the United States to the State of Nevada of title to the right to use the unappropriated ground waters within the Hawthorne Naval Ammunition Depot, the ownership thereof continues in the United States free of any authority in the State of Nevada to control their use by the United States.*

Inasmuch as title to the unappropriated waters pertaining to the lands of the United States has not been transferred to the States, it follows that Nevada's claim of power to control the use of the underground waters within the Hawthorne Naval Ammunition Depot based on her asserted ownership of those waters is wholly unsupportable.[32] The inescapable corollary of this is that title thus continues in the United States, in whom it vested in 1848. See *Winters* v. *United States, supra,* pp. 67 and 70; *Howell* v. *Johnson,* 89 Fed. 556, 558, 559 (C.C.D. Mont., 1898), cited with approval in *California Oregon Power Company* v. *Beaver Portland Cement Co.; Hough* v. *Porter, supra,* footnote 25; *Nevada Ditch Co.* v. *Bennett,* 30 Ore. 59, 103, 104, 45 Pac. 472, 484 (1896); *Lux* v. *Haggin,* 69 Cal. 255, 338-339, 4 Pac. 919 (1884), 10 Pac. 674 (1886); *Duckworth* v. *Watsonville Water & Light Co.,* 150 Cal. 520, 531, 89 Pac. 338 (1907); and *San Bernardino* v. *Riverside, supra,* p. 59; *United States* v. *Conrad Investment Company, supra,* footnote 27; *United States* v. *McIntire,* 101 F. 2d 650 (C.A. 9, 1939); *United States* v. *Walker River Irriga-*

[32] Surely the contention that by the declaration of her legislature of public ownership of the waters within the State, Nevada acquired either an ownership of or power to control the waters in question is without merit. What the State did not have, she could not acquire by *ipse dixit,* such as this. *San Bernardino* v. *Riverside, supra,* p. 59; Kinney, *infra,* footnote 33.

tion District, 104 F. 2d 334 (C.A. 9, 1939); *United States* v. *Ahtanum Irrigation District et al.,* 236 F. 2d 321 (C.A. 9, 1956), *cert. denied,* 352 U.S. 988.[33] It is therefore indisputable that the appellant's claim of power to control and prohibit the use of those waters by the United States cannot be sustained on *any* basis. For, as we have pointed out earlier, if one thing is plain in constitutional law it is that the States cannot prohibit, control or regulate the use by the United States of its own property. *A fortiori,* a State cannot do so when such property is located outside the area of the State's legislative jurisdiction (*supra,* pp. 43-49), or when the effect of such regulation might be completely to frustrate the performance by the United States of their constitutional functions (*supra,* pp. 49-57).

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[33] Kinney, based on an impressive body of decisions (Kinney on Irrigation and Water Rights, Vol. 1, 2d ed., sec. 411, pp. 692-3), concludes that title to the unappropriated rights to the use of water resides in the United States:

> The Government is still the owner of the surplus of the waters flowing upon the public domain or rather the owner of all the waters flowing thereon remaining after deducting the rights to the use of the same which have vested in and accrued in some legal way to individuals and companies. * * *
>
> It therefore follows, as the result of the ownership by the United States of the waters flowing upon the public domain, that any dedication by a State of all the waters flowing within its boundaries to the State or to the public amounts to but little, in the face of any claim which may be made by the Government, *at least* to all the surplus or unused waters within such State. * * *

C. *Section 666, 43 U.S.C., does not support appellant's argument that even though the United States owns under Federal law rights to the use of water, it shall be deemed to have waived those rights whenever a suit purportedly under authority of the statute is initiated.*

Appellant argues that the effect of the second sentence of paragraph (a) of Section 666, *supra,* p. 3, is to require that even though the United States owns rights to the use of water under Federal law, whenever suit is brought under purported authority of that statute those rights may not be asserted except as recognized under the law of the State wherein the water is applied to use. Therefore, she says, since this is purportedly a suit under § 666 and the United States has not obtained a permit from the State Engineer of Nevada to use the waters in question, the United States may not assert its rights independent of the law of the State and the use should be declared illegal. A more transparently "boot strap" argument would be hard to invent.

We have shown that because there is presented no question of conflict with the rights of other water users, there is no justiciable controversy and the questions presented here are not appropriate for judicial settlement. *Supra,* pp. 12-22. We have shown that § 666 cannot be construed as attempting to authorize exercise of the judicial power to resolve a controversy such as this, and that if it were so construed, there would be serious doubt as to the statute's validity. *Supra,* pp. 33-35. We have shown at length the other reasons why § 666 cannot be construed as granting consent to suits such as this, *supra,* pp. 22-43, and that if the statute

were interpreted as authorizing this suit, there would be additional questions of constitutionality. *Supra,* pp. 41-43.

In addition, we have shown that the laws of Nevada are without effect within the Hawthorne Naval Ammunition Depot simply because that area is beyond the reach of the State's legislative power. *Supra,* pp. 43-49. We have also shown that there are constitutional obstacles to the enforcement of any law, State *or* Federal, the effect of which would be to require that the United States conduct its activities which are essential to the performance of its constitutional functions in the interest of National Defense only as and if permitted by the several States. *Supra,* pp. 49-57.

It is only if we are wrong on each and every one of these points that consideration need be given to the appellant's contention last above noted. But only brief consideration of the contention will demonstrate its invalidity.

Section 666 is not a substantive law. Its purpose was solely to remove the sovereign immunity of the United States from suits for the adjudication or administration of rights to use the waters of a river system or other source, simply because without such waiver of immunity it was impossible in many areas of the West to obtain a final adjudication. The language of the statute makes this clear. The exchange of correspondence between Senators Magnuson and McCarran, "made a part of" Senate Report No. 755 (Appendix A) makes it clear. The whole body of the rest of the report makes it clear. "Congress has not removed the bar of immunity even in its own courts in suits wherein water rights acquired under State law are drawn in question. The bill (S. 18) was introduced for the very

purpose of correcting this situation and the evils growing out of such immunity." Appendix A, pp. 86-87.

When Congress said that the United States, when a party to "any *such* suit"—that is, one authorized under the first sentence of paragraph (a)—shall "be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty," it simply meant that, as a corollary of the consent to be sued, the United States should not assert that *applicable* State laws are inapplicable to the United States because of the sovereignty of the United States.[34] This is a far cry from stating the conclusion for which appellant contends. Congress did not say when the United States is joined in any suit purportedly brought under authority of § 666, Art. VI, Cl. 2, of the Constitution of the United States should be inapplicable—or that no constitutional function of the United States requiring the use of water might be performed unless such use was authorized by State authorities—or that Federally-owned rights to the use of water not dependent upon State law might be exercised only if permitted by State authorities—or that all areas over which legislative jurisdiction had been ceded to the United States should be deemed to have been retroceded.

Congress does not—and we doubt that it could if it attempted to—dispose of the properties of the United

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[34] The District Court commented on this language of the statute in this fashion: "This does not mean, however, that the United States cannot invoke Federal statutes and decisions in support of its claim that it need not obtain a permit from the State to use underground waters in a naval installation. This Court does not believe that the defendant stultified itself by giving its case away in advance: All laws, both State and Federal, are to be considered in this case, *insofar as they are relevant.*" [Emphasis supplied.] R. 65-66; 165 F. Supp. 604.

States [35] or of its constitutional rights and powers by such ambiguous means as this. Surely this is true when the language which it is said constitutes a wholesale abandonment of water rights owned by the United States and of the power to control Federal water-using activities is no more than an explanatory statement in a statute "not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate *all* of the rights of various owners on a given stream.[36]

The foregoing demonstrates the fallacy of appellant's contention. Attention to some of the consequences which would follow from upholding that contention is further demonstrative of its weakness.

Admittedly, the United States is engaged in many water-using activities throughout the Nation, its rights to the use of water in which have not been acquired in accordance with the laws of the States relative to the appropriation, control, use and distribution of water. Is it contended that if the United States, as plaintiff, brings suit for adjudication of the rights to use the waters involved in any of those projects it may assert its rights not dependent upon State law, but if someone else wins the race to the Court House and starts suit under § 666 those rights are abandoned?

In two recent cases (*Anderson* v. *Seeman et al.,* 252 F. 2d 321 (1958), *cert. denied* 358 U.S. 820; *Neches River Conservation District* v. *Seeman,* 252 F. 2d 327 (1958), *cert. denied* 358 U.S. 820), the Fifth Circuit

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[35] See footnote 26, *supra.*

[36] Attention should be invited also to the fact that enactment of the statute was accomplished by its attachment as a rider to an appropriation bill. And see paragraph (d) of the rider, and the comment of this Court with respect thereto in *Santa Margarita Mutual Water Company* v. *United States,* 235 F. 2d 647, 653 (1956).

Court of Appeals held that the Rivers and Harbors Act of 1945 does not require the acquisition of a permit from the Texas State Board of Water Engineers for the construction of a Federal dam authorized by that Act, and that the Texas law requiring that such a permit be obtained was not applicable. Those suits were brought, not against the United States, but against the officers in charge of the project. Would this Court be inclined to the view that all the plaintiffs in those cases need do in order to obtain the relief they wish is to bring suit against the United States under purported authority of § 666?

Would the Court be disposed to hold that in a suit purportedly under authority of § 666 the construction of Hoover Dam could have been enjoined because the United States did not have a permit from the State of Arizona? Cf. *Arizona* v. *California,* 283 U.S. 423. It could not be so, because the very point was made in the correspondence between Senators Magnuson and McCarran that the proposed legislation was not meant to obstruct such projects. Appendix A, pp. 87-90.

In the pending case of *Arizona* v. *California,* No. 9 Original in the Supreme Court of the United States, there are at issue the rights of the United States to use water on some twenty-six Indian reservations. Would it be reasonable to conclude that in that litigation the United States, a party to the case by intervention, may prove such rights as it has with respect to those reservations under the doctrine of *Winters* v. *United States, supra,* p. 70, but that in other litigation brought under authority of § 666 those rights, which are not dependent upon the laws of the States, shall be deemed abandoned?

~~It is~~ reasonable to suppose that Congress intended by
Is it

§ 666 to abandon all of the reserved rights to use water which it holds for Indians and Indian tribes?

Can it be supposed Congress intended that when suit is brought under purported authority of § 666 no cession of legislative jurisdiction by a State to the United States shall be applicable but that the same cession shall continue in effect for all other purposes?

We believe that each of these questions must obviously be answered against Nevada's contention that § 666 does something more than waive the United States' sovereign immunity in a proper suit under authority of that section. Accordingly, we submit there is nothing in the statute which in any way affects the substantive law here applicable even if the Court should consider that the statute applies to a case such as this.

CONCLUSION

It is respectfully submitted that appellant's complaint should have been dismissed for lack of jurisdiction, and that in the alternative judgment for the appellee should be affirmed.

Respectfully submitted,

PERRY W. MORTON,
Assistant Attorney General.

HOWARD W. BABCOCK,
United States Attorney.
DAVID R. WARNER,
CHARLES G. LUELLMAN,
Attorneys, Department of Justice.

APPENDIX A

The following excerpts from Senate Report No. 755, 82nd Congress, 1st Session, are particularly pertinent to the questions of interpretation of Section 666, 43 U.S.C., discussed in the brief.

Pages 4 and 5:

It is most clear that where water rights have been adjudicated by a court and its final decree entered, or where such rights are in the course of adjudication by a court, the court adjudicating or having adjudicated such rights is the court possessing the jurisdiction to enter its orders and decrees with respect thereto and thereafter to enforce the same by appropriate proceedings. In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts. Unless Congress has removed such immunity by statutory enactment, the bar of immunity from suit still remains and any judgment or decree of the State court is ineffective as to the water right held by the United States. Con-

gress has not removed the bar of immunity even in its own courts in suits wherein water rights acquired under State law are drawn in question. The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity.

Page 6:

The committee is of the opinion that there is no valid reason why the United States should not be required to join in a proceeding when it is a necessary party and to be required to abide by the decisions of the Court in the same manner as if it were a private individual.

Senator Magnuson raised the question as to whether S. 18 could be used for the purpose of delaying or blocking a multiple-purpose development such as proposed for the Hells Canyon project on the Snake River in the Columbia Basin or other similar projects, stating that there was a possibility of an individual or group having water rights on that stream bringing suits to adjudicate their respective rights and therefore preventing the Bureau of Reclamation from going ahead with the Hells Canyon project while litigation is in process or pending. The committee, for the legislative history of this bill, definitely desires to repudiate any such intent which may be deduced from S. 18 and states that this is not the purpose and the intent of this legislation. Where reclamation projects have been authorized for the benefit of the water users and the public generally, they should proceed under the law as it exists at the present time and should the Government have reason to need the water of any particular user on a stream, that water should be obtained by condemnation proceedings as is already provided for by law.

The committee can think of no particular reason why the mere development of a project should be delayed or stopped by the passage of S. 18 and it is not so intended. An exchange of letters by Senator Magnuson and Senator McCarran dealing with this feature of the bill is hereto attached and made a part of this report.

Pages 9 and 10:

August 24, 1951.

Re S. 18.

Hon. Pat McCarran,
Chairman, Committee on the Judiciary,
United States Senate.

DEAR SENATOR: I am in agreement with the general purposes of S. 18. However, there is one possible implication in the bill that has caused me some apprehension and I take this means of achieving clarification before final action by our committee occurs.

It appears to me that section 1 of the bill—although I am sure that is not the intent—might make it possible to block or delay a multiple-purpose development, such as proposed for the Hells Canyon project on the Snake River in the Columbia Basin.

I visualize the possibility of an individual or group, having water rights on that stream, bringing suit to adjudicate their respective rights—thereby preventing the Bureau of Reclamation from going ahead with the Hells Canyon project while litigation is in process or pending. Such action on the part of appropriators might be taken on their own initiative or might be stimulated by third parties who have been opposing this development.

A similar set of circumstances might prevail with respect to other streams in the Basin. I will appreciate the benefit of your best judgment as to whether

S. 18 could be used in the manner I have described. I think clarification on this point will be extremely useful if made a part of the legislative history of this bill.

* * * * *

Sincerely,

WARREN G. MAGNUSON,
U. S. S.

August 25, 1951.

Hon. Warren G. Magnuson,
United States Senate, Washington, D. C.

MY DEAR SENATOR MAGNUSON: I was very pleased to receive your letter of August 24, 1951, relative to S. 18, which provides for the joining of the United States in suits involving water rights where the United States has acquired or is in the process of acquiring water rights on a stream and is a necessary party to the suit.

I note that you raise the question that it might be possible to block or delay a multiple-purpose development, such as proposed for the Hells Canyon project on the Snake River in the Columbia Basin. You indicate that you visualize the possibility of an individual or group, having water rights on that stream, bringing suit to adjudicate their respective rights thereby preventing the Bureau of Reclamation from going ahead with the Hells Canyon project while litigation is in process or pending.

S. 18 is not intended to be used for the purpose of obstructing the project of which you speak or any similar project and it is not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties

owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value. I agree with you that for purposes of legislative history, the report should show that S. 18 is not intended to be used for the purpose of obstructing or delaying Bureau of Reclamation projects for the good of the public and water users by the method of which you speak and in that connection I propose that such a statement be incorporated in the report and that this exchange of letters be attached thereto.

* * * * *

Sincerely,

PAT MCCARRAN,
Chairman.

APPENDIX B

Constitution of the United States—

Art. IV, Sec. 3, Cl. 2:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States;

Art. VI, Cl. 2:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Art. I, Sec. 8:

> The Congress shall have Power To * * * provide for the common Defence * * * ; (Cl. 1)
> To make Rules for the Government and Regulation of the land and naval Forces; (Cl. 14)

Section 9 of the Act of July 26, 1866, 14 Stat. 251, 253, 30 U.S.C. 51, 43 U.S.C. 661:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same;

Section 7 of the Act of July 9, 1870, 16 Stat. 217, 218, 43 U.S.C. 661:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act granting the right of way to ditch and canal owners over the public lands, and for other purposes, approved July twenty-six, eighteen hundred and sixty-six, be, and the same is hereby amended by adding thereto the following additional sections, numbered twelve, thirteen, fourteen, fifteen, sixteen, and seventeen, respectively, which shall hereafter constitute and form a part of the aforesaid act.

* * * * *

Sec. 17. *And be it further enacted,* That none of the rights conferred by sections five, eight, and nine of the act to which this act is amendatory shall be abrogated by this act, and the same are hereby extended to all public lands affected by this act; and all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory. * * *

Section 1 of the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. 321:

It shall be lawful for any citizen of the United States, * * * to file a declaration * * * that he intends to reclaim a tract of desert land * * * by conducting water upon the same, within the period of three years thereafter: *Provided, however,* That the right to the use of water by the person so conducting the same, on or to any tract of desert land * * * shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appro-

priated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the *public lands* and not navigable, *shall remain and be held free for the appropriation and use of the public* for irrigation, mining, and manufacturing purposes subject to existing rights. * * * [Emphasis supplied.]

Act of March 21, 1864, 13 Stat. 30 [Nevada Enabling Act]:

Sec. 4. * * * That said convention shall provide, by an ordinance irrevocable, without the consent of the United States and the people of said state:—

* * * * *

Third. That the people inhabiting said territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States; * * *

Nevada Constitution, Nevada Compiled Laws, 1929, Section 20, Nevada Revised Statutes, Vol. 5, Constitution [Preliminary Action]:

* * * * *

§ 3. In obedience to the requirements of an act of the Congress of the United States approved March twenty-first, A. D. eighteen hundred and sixty-four, to enable the people of Nevada to form a constitution and state government, this convention, elected and convened in obedience to said enabling act, do ordain as follows, and this ordinance shall be irrevo-

cable, without the consent of the United States and the people of the State of Nevada:

* * * * *

Third—That the people inhabiting said territory do agree, and declare, that they forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States; * * *

Act of March 28, 1935, Ch. 144, Statutes of Nevada, 1935:

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

Section 1. The State of Nevada, except as hereinafter reserved and provided, hereby cedes jurisdiction to the United States upon and over the land and within the premises of that certain area situated near Hawthorne, Nevada, in Mineral County, commonly known as the "U. S. N. Ammunition Depot," comprising all of that certain area now occupied by the federal government in connection with said plant, or to be hereafter acquired or annexed thereto, or to be used in connection therewith, including all the buildings and improvements thereon.

Sec. 2. It is hereby reserved and provided by the State of Nevada that any private property upon said lands or premises shall be subject to taxation by the state, or any subdivision thereof having the right to levy and collect such taxes, but any property upon or within such premises which belongs to the government of the United States shall be free of taxation by the state, by the county of Mineral, or any of its subdivisions.

Sec. 3. The State of Nevada reserves the right to serve or cause to be served, by any of its proper officers, any criminal or civil process upon such land or within such premises for any cause there or elsewhere in the state arising, where such cause comes properly under the jurisdiction of the laws of this state or any subdivision thereof.

Sec. 4. This act shall be in full force and effect from and after its passage and approval.

Sec. 84, Ch. 140, Nevada Statutes, 1913, § 7970, Nevada Compiled Laws, 1929, Nevada Revised Statutes § 533.085 Vested rights to water not impaired.

1. Nothing contained in this chapter shall impair the vested right of any person to the use of water nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

* * * * *

Act of March 24, 1915, Ch. 210, Nevada Statutes, 1915, § 7987, Nevada Compiled Laws, 1929:

§ 1. All underground waters save and except percolating water, the course and boundaries of which are incapable of determination, are hereby declared to be subject to appropriation under the laws of the state relating to appropriation and use of water.

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